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91-452

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LENORA B. FULANI, *et al.*,

Petitioners,

vs.

NICHOLAS F. BRADY, Secretary of the Treasury, FRED T. GOLDBERG, JR., Commissioner of Internal Revenue and COMMISSION ON PRESIDENTIAL DEBATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an independent candidate for President have standing to challenge the government's knowing refusal to enforce the anti-electioneering prohibition of I.R.C. § 501(c)(3) against a voter education organization that is sponsoring two-party candidate debates which exclude the plaintiff and all other independent candidates and that thereby miseducates voters that the nominees of the Democratic and Republican Parties are the only legitimate candidates, when the sought-after revocation of the organization's tax-exempt status would stop it from sponsoring such debates?

PARTIES TO THE PROCEEDING

The petitioners, who are plaintiffs and appellants below, are Dr. Lenora B. Fulani, Lenora B. Fulani's Committee for Fair Elections, and Barbara Taylor.*

Respondents, Nicholas F. Brady, as Secretary of the Treasury and Fred T. Goldberg, as Commissioner of Internal Revenue, are defendants and appellees below. Respondent Commission on Presidential Debates is intervenor-defendant and appellee below.

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* **Rule 29.1 Statement Regarding Petitioners:** None of the petitioners is a corporation.

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IN THE
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No.

LENORA B. FULANI, et al,

Petitioners,

— against —

NICHOLAS F. BRADY, Secretary
of the Treasury, FRED T. GOLDBERG, JR.,
Commissioner of Internal Revenue, and
COMMISSION ON PRESIDENTIAL DEBATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Lenora B. Fulani et al., ("Fulani") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (1a-14a) is reported at 935 F.2d 1324 (D.C. Cir. 1991). The opinion of the district court (27a-41a) is reported at 729 F. Supp. 158 (D.D.C. 1990).

JURISDICTION

The judgment of the court of appeals affirming the district court's granting of a motion to dismiss was entered on June 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;...to controversies to which the United States shall be a party;

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law;

Section 501 of the Internal Revenue Code, 26 U.S.C. § 501, provides in pertinent part:

> (a) Exemption from taxation. — An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503...
>
> (c) List of exempt organizations. — The following organizations are referred to in subsection (a): ...

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,..., no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Federal Election Commission Regulation 11 C.F.R. § 110.13 (1988) provides in pertinent part:

(a) Staging organizations. (1) A nonprofit organization which is exempt from federal taxation under 26 U.S.C. § 501(c)(3), and a nonprofit organization which is exempt from federal taxation under 26 U.S.C. § 501(c)(4) and which does not endorse, support or oppose political candidates or political parties may stage nonpartisan candidate debates in accordance with 11 CFR 110.13(b) and 114.4(e).

Federal Election Commission Regulation 11 C.F.R. § 114.4 (e)(1) provides:

(e) Nonpartisan candidate debates. (1) A nonprofit organization qualified under 11 CFR 110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations under 11 CFR 114.4(e)(3) to defray costs incurred in staging nonpartisan candidate debates held in accordance with 11 CFR 110.13.

STATEMENT OF THE CASE

On September 20, 1988, petitioners (hereinafter collectively referred to as "Fulani") commenced this action against the Secretary of the Treasury and the Commissioner of Internal Revenue (hereinafter collectively referred to as the "IRS," "Secretary," or "government") seeking to compel the government to revoke the tax-exempt status of the Commission on Presidential Debates ("CPD"). Fulani alleged that the CPD was neither created nor operated as a nonpartisan voter education organization, but rather, was a self-avowed two-party organization. It was sponsoring a voter education program consisting of one or more televised presidential candidate debates. But it had structured the program to ensure that no significant independent candidate[1] for the Presidency could be included. Fulani claimed that the government had violated its constitutional and statutory obligations by failing, even after express demands, to enforce the anti-electioneering requirements of § 501(c)(3) of the Internal Revenue Code (the "Code"), 26 U.S.C. § 501(c)(3), against the CPD.

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[1] On a motion to dismiss under Fed. R. Civ. P. 12 claiming lack of standing, Fulani's allegations about her candidacy are assumed to be true and must be read in the light most favorable to her claims. See United States v. SCRAP, 412 U.S. 669, 689 (1972) (defendants should have moved for summary judgment if their argument for dismissal on standing grounds was premised on challenge to truth of any allegations in the complaint). See also Warth v. Seldin, 422 U.S. 490, 501 (1975).

Fulani alleged (and it was undisputed) that she was certified by the Federal Election Commission as eligible for presidential primary matching funds; she was the only candidate other than George Bush and Michael Dukakis who was on the ballot in all 50 states and the District of Columbia; and she was the first woman and the first African-American ever to be on the presidential ballot in every state.

Fulani alleged that the CPD's institutionalizing of two-party selection criteria for presidential debates injured her not only by excluding her from the debates, but also by conveying to the public that her candidacy (and any other independent candidacy) was not legitimate and was irrelevant to the presidential election contest. This message caused her to lose contributions of money and services, print and broadcast media coverage, and votes.

Fulani moved the district court for a preliminary injunction seeking to prevent the CPD's voter education program from continuing unless Fulani's candidacy was included. The sought-after relief included an injunction requiring the IRS to revoke the CPD's tax-exempt status unless it immediately restructured its debates to constitute a bona fide nonpartisan voter education program. Without its § 501(c)(3) exemption in force, the CPD could not have gone forward with its debates. To do so would have violated federal statutes and regulations which prohibit corporate expenditures to sponsor candidate debates, unless the sponsoring organization is a nonpartisan organization that the Internal Revenue Service has recognized for tax exemption under I.R.C. § 501(c)(3). See 11 C.F.R. §§ 110.13, 114.4(e) (1988).[2]

On September 23, 1988, the district court ruled that Fulani had demonstrated "serious questions" concerning the constitutionality of the continuing grant of tax-exempt status by the government to the CPD, but denied the injunction on "public interest" grounds. (On September 24, 1988, the court of appeals denied Fulani's emergency motion for injunction pending appeal.)

The CPD then proceeded to stage the first general election debate between candidates Bush and Dukakis. At that time, the CPD, the League of Women Voters Education Fund, Inc. (the "League") and the Bush and Dukakis campaigns were operating under an agreement whereby the second of two presidential debates would be sponsored by the League. However, the League withdrew its sponsorship under protest after the major party candidates insisted upon such detailed control over the staging of the debates

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[2] In its transmittal of these regulations to Congress the FEC explained:

> The main purpose of these regulations is to create a narrow exemption from the provisions of the Federal Election Campaign Act....With this exemption, expenditures for staging such debates will be regarded as neither made for the purpose of influencing an election under 2 U.S.C. §§ 431(e) and 431(f), nor in connection with a federal election under 2 U.S.C. § 441(b).

44 Fed. Reg.76,734 (1979).

that the League determined that to hold itself out as an independent sponsor of such a production would make it "an accessory to the hoodwinking of the American public."[3] The CPD immediately offered to sponsor the second debate in accordance with the candidates' specifications.

Plaintiffs then brought on a renewed motion for a preliminary injunction. On October 12, 1988, the district court denied the motion, but reiterated its belief that the plaintiffs' claims on the merits were serious ones.

After the election, the government moved to dismiss the complaint on the grounds, inter alia, that Fulani lacked standing to challenge its alleged unconstitutional enforcement of I.R.C. § 501(c)(3). Fulani and the government simultaneously were litigating this identical issue before the Second Circuit Court of Appeals, in a case growing out of the primary election debates sponsored by the League. On August 2, 1989, the Second Circuit held that Fulani had standing to challenge the government's allegedly biased enforcement of § 501(c)(3)'s non-electioneering requirements against a sponsor of Presidential candidate debates. See Fulani v. League of Woman Voters, 882 F.2d 621 (2d Cir. 1989).[4]

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[3] League of Women Voters, Statement by Nancy M. Newman, President, League of Women Voters (Oct. 3, 1988); League of Women Voters, "League Refuses to 'Help Perpetrate a Fraud:' Withdraws Support From Final Presidential Debate," News Release (Oct. 3, 1988); copies annexed as Exhibit C to Plaintiffs' Renewed Motions for a Preliminary Injunction and Temporary Restraining Order in the district court, reproduced in court of appeals appendix at A-205-208.

[4] Reaching the merits of plaintiffs' constitutional claims, the Second Circuit accepted the plaintiffs' key contentions that the tax laws were not pre-empted by the federal election finance laws in the realm of voter education and candidate debates, and that the Internal Revenue Code prohibited a tax exempt organization's "selective promotion of certain parties over others." (emphasis in original) Fulani v. League of Women Voters, 882 F.2d 621, 629 (2d Cir. 1989). (57a) It finally ruled against plaintiffs on the merits, carefully grounding its holding on the difference between the primary season and general election debates. "It is of critical importance," the Court said, "that the subject debates were not general election debates." (emphasis in original) Id. (58a)

On February 2, 1990, the district court in the instant case issued its decision dismissing the complaint on the grounds that plaintiffs lacked Article III standing to challenge the federal defendants' continuation of the CPD's tax-exempt status. It specifically disagreed with the Second Circuit's reasoning in Fulani v. League of Women Voters. (34a).

Fulani appealed to the United States Court of Appeals for the District of Columbia Circuit, which had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. On June 14, 1991, the court of appeals issued a 2-1 decision affirming the district court's dismissal on standing grounds. In an opinion by Judge Sentelle, the majority agreed with the Second Circuit that Fulani had suffered injury in fact, but rejected its reasoning with regard to traceability and redressability. Judge Mikva wrote a dissenting opinion in which he said that the majority "misreads seminal decisions in the standing area, adopting a constricted reading inconsistent with judicial practice." (15a).

REASONS FOR GRANTING THE WRIT

I. THERE IS AN IRRECONCILABLE CONFLICT BETWEEN THE COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE SECOND CIRCUIT ON A CONSTITUTIONAL ISSUE OF MAJOR IMPORTANCE

A. Whether The Election Of The President Of The United States Will Be Conducted In Accordance With Fundamental Constitutional Guarantees And Democratic Principles Is Of National Significance

In his dissenting opinion in the court below, Chief Judge Mikva warned:

> The government of any democracy, let alone one shaped by the values of our Constitution's First Amendment, must avoid tilting the electoral playing field, lest the democracy itself become tarnished.

(26a) This warning is both timeless, and timely.

It is timeless because it echoes one of the most strongly held beliefs of the Founding Fathers. In the words of the pre-eminent historian of American party politics, Richard Hofstadter,

> The Fathers hoped to create not a system of party government under a Constitution but rather a constitutional government that would check and control parties....Although Federalists and Anti-Federalists differed over many things, they do not seem to have differed over the proposition that an effective constitution is one that successfully counteracts the work of parties.[5]

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[5] R. Hofstadter, The Idea of a Party System 53 (1969). The Federalist Papers warned of the dangers of "factions" in the political life of the new nation. J. Madison, "Federalist X," in Madison, Hamilton and Jay, The Federalist Papers 122-128 (Penguin Books 1987). Echoing this concern, anti-Federalist Thomas Jefferson wrote to Francis Hopkinson on March 13, 1789, "If I could not go to heaven but with a party, I would not go there at all." J. Boyd, ed., Papers of Thomas Jefferson XIV, 650 (1958), cited in L. Lurie, Party Politics 8 n.14 (1982).

Accordingly, under the United States Constitution no preferred legal status has been given to any political party or parties. This principle has set the United States apart from many other nations of the world where regimes have sought to legitimize themselves by adopting a constitution that purports to limit the powers of government and permit freedom of expression, but then vitiates the rights of political opposition by giving a "leading role" or other exclusive legal status to one or more political parties that are under the control of ruling elites.

Chief Judge Mikva's warning is timely, because this case grows out of an historic juncture in American party politics that poses a serious threat to the basic democratic principles on which this nation was founded. For a century, the Democratic and Republican Parties have dominated American party politics. Throughout this era, this Court has been vigilant to protect the rights of independent candidates and minor parties, recognizing that under our system of government the continuation of any political party's dominant role must be earned in a democratic electoral competition with other candidates and parties, and not guaranteed by partisan governmental intervention.

For example, when this Court found unconstitutional an Ohio statute that would have prevented independent presidential candidate John Anderson from being on the ballot, Justice Stevens wrote for the Court:

> By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream...[T]he primary values protected by the First Amendment...are served when election campaigns are not monopolized by the existing political parties.

Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) (emphasis supplied; citations omitted).

The greater the electoral threat to the dominant two parties, the greater the pressure on government officials who are affiliated with those parties to violate the First Amendment by using the levers of executive power to put greater obstacles in the paths of third party challenges. Over the past decade, these pressures have been accentuated by a steady drop in voter allegiance to the major parties[6] and the quantitatively small but qualitatively significant growth of two national minor parties.

In the 1950's, 1960's and 1970's there were small independent parties in the electoral arena, but no stable national independent parties with support from the political

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[6] In 1991, voter identification with the major parties is at the lowest point in this century; in response to polls by The New York Times and CBS News, 19% of the voters described themselves as independents, and 6% said they "don't know" about their party identification. Clymer, "Poll Finds G.O.P. Growth Erodes Dominant Role of the Democrats," N.Y. Times, July 14, 1991, at 1. Voter dissatisfaction with the choices available to them also is expressed in sharp and steady drops in voter participation: only half of the Americans of voting age felt it was worth their time to go to the polls in the 1988 Presidential election, a decline of over 3% from 1984. Federal Election Commission, Official Tabulation of 1988 Presidential Election Votes (May 19, 1991).

The participation rate in the 1990 election was 37.2%. Election Data Services, Inc. (Washington, D.C.), November, 1990 Registration and Turnout, By State (tabulation dated 7/31/91). Those who did vote in 1990 elected two independent Governors (Lowell Weicker in Connecticut and Walter Hickel in Alaska) and the first independent member of the House of Representatives since 1952 (Bernie Sanders of Vermont).

Many commentators have linked the steadily decreasing voter participation rates to the inability of the major party contests to generate serious dialogue on public policy issues. The New York Times began a four part series on American politics with the observation:

> As America's democratic visions and values seem to triumph around the world, an unhappy consensus has emerged at home that domestic politics has become so shallow, mean and even meaningless that it is failing to produce ideas and leadership needed to guide the United States in a rapidly changing world.

Orestes, "America's Politics Loses Way As Its Vision Changes World," N.Y. Times, March 18, 1990, at 1, col. 1.

mainstream emerged. The two most significant independent candidacies of this period were one-time efforts. After his 1968 independent campaign, George Wallace returned to the Democratic Party and his American Independent Party quickly receded from national prominence. John Anderson and his Unity Party made a quick and final exit from national electoral politics after the1980 election.

In the 1980's, however, two national independent parties were established, the Libertarian Party and the New Alliance Party. They have the organizational capacity to run presidential candidates in all fifty states and to qualify for federal primary matching funds. As a result of their long-term party building efforts, the 1992 election will be the fifth consecutive presidential race for the Libertarians, and the third for the New Alliance. Hence, there are now three sectors in American party politics — the major party sector (Democratic and Republican), the national independent party sector (New Alliance and Libertarian) and the state or multi-state level minor party sector (numerous small parties).

The petitioners brought this case in order to challenge, in the words of Chief Judge Mikva, "federal complicity in keeping minor political parties off the national stage." (26a) The Treasury Department has put two-party politics ahead of the Constitution of the United States. The granting of a § 501(c)(3) tax exemption to the avowedly two-party Commission on Presidential Debates violates not only the First Amendment, but also the explicit Congressional policy "'that the U.S. Treasury should be neutral in political affairs.'"[7]

The federal courts have always been the arbiter of whether government officials have abused their official powers in order to consolidate their parties' hold on office.

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[7] Association of the Bar of the City of New York v. Commissioner, 858 F. 2d 876, 879-80 (2d Cir. 1988), cert. denied, 410 U.S. 1030 (1989) (quoting from H.R. Rep. No. 391, 100th Cong., 1st Sess. 1621, 1625 (1987), reprinted in 1987 U.S.Code Cong. & Admin. News 2313-1, 2313-1201, 2313-1205). See also Fulani v. League of Women Voters, 882 F. 2d 621, 629 (2d Cir. 1989) (57a).

See, e.g., Anderson v. Celebrezze, supra (ballot access); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas as well as attaining political office....Overbroad restrictions on ballot access jeopardize this form of political expression."); Baker v. Carr, 369 U.S. 186 (1962) (one person-one vote principle); Davis v. Bandemer, 478 U.S. 109 (1986) (politically partisan gerrymandering violates equal protection clause if discriminatory vote dilution is shown); First National Bank of Boston v. Bellotti, 435 U.S. 765, 809 (White, J., dissenting) ("[the desired end] is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process...."); Common Cause v. Bolger, 512 F. Supp. 26, 32 (D.D.C. 1980) (three-judge court) (first amendment protects use of election campaigns as a form of political advocacy even if candidate stands no chance of winning).

The court of appeals' decision denying standing to petitioner Fulani "insulates from review" (26a) a claim that the 1988 Presidential election was — and the 1992 election will be — conducted in a manner that unconstitutionally uses governmental power to miseducate the American voters about their voting options for the office of President of the United States. This is a case of national significance.

B. The Decision Below Squarely Conflicts With A Decision Of The Court Of Appeals For The Second Circuit Between The Same Principal Parties And On The Same Matter

The United States Supreme Court Rule 10 sets forth the "character of reasons that will be considered" when the Court exercises its discretion upon review on a writ of certiorari. The first listed of such reasons is

> when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; ....

In order to dismiss Fulani's claims on standing grounds, the district court and the District of Columbia Court of Appeals each specifically disapproved the holding of the Second Circuit Court of Appeals in its decision in the "parallel" (8a) case, Fulani v. League of Women Voters Education Fund, 882 F. 2d 621 (2d Cir. 1989) (42a-66a) ("League of Women Voters"). Both the instant case and League of Women Voters were suits by Fulani against the Secretary of the Treasury challenging the tax exemption of a voter education organization; they presented the same issue of standing. Accordingly, this petition presents a classic example of an irreconcilable conflict between two federal courts of appeals.

During the primary election phase of the 1988 campaign, the League of Women Voters Education Fund (the "League") was sponsoring a voter education program consisting of debates among candidates seeking the nomination of either the Republican Party or the Democratic Party. When the League excluded Fulani from this program solely because of her nonaffiliation with either of those two parties, she sued the Secretary of the Treasury. Her claim was that the League's explicit two-party affiliation criterion violated the non-electioneering provisions of I.R.C. § 501(c)(3).

The government sought dismissal of the case on the grounds that Fulani lacked standing to challenge the League's tax exemption. Soundly rejecting this argument, the Second Circuit held that Fulani clearly had met the three-part standing test of Allen v. Wright, 468 U.S. 737 (1984). A month later, in a decision denying standing to pro-choice clergymen and individuals who had sued the IRS seeking revocation of the tax exemption of the Catholic Church, another Second Circuit panel reaffirmed the holding in League of Women Voters. See In re United States Catholic Conference, 885 F. 2d 1020, 1034 (2d Cir. 1989) (on rehearing, per curiam), cert. denied, ___ U.S. ___, 110 S.Ct. 1946 (1990) ("[T]he competition in Fulani is more direct and immediate").

During the 1988 general election campaign, Fulani sued the Secretary in the United States District Court for the District of Columbia, claiming that the Commission on Presidential Debates was, de facto, selecting candidates for participation in its general election debates on the basis of affiliation with either the Democratic or the Republican Party. The CPD's two-party debates, she said, violated the nonpartisanship requirements of § 501(c)(3). The government presented the district court and then the court of appeals below with the same standing arguments it had unsuccessfully pressed before the Second Circuit. This time the government prevailed.

Rejecting the Second Circuit's ruling in its entirety, the district court held that Fulani failed each prong of the Allen standing test. The court of appeals, however, in affirming the district court's judgment, conceded that Fulani had demonstrated "injury in fact." Its disagreement with the Second Circuit was with its analysis of "traceability" and "redressability."

The Second Circuit had found that there was no need to speculate about the traceability and redressability of Fulani's injury "because there is an evident nexus between the government's tax treatment of the League and the claimed injury." 882 F. 2d 621, 627 (55a). As to traceability it concluded:

> [T]he asserted harm also flows from the League's and the federal government's allegedly partisan restriction of her opportunities to communicate her political ideas to the voting public at large. That is the essence of the judicially cognizable injury which Fulani has asserted, and, on the facts of this case, that is the injury which we find 'fairly traceable' to her exclusion from the League-sponsored debates.

Id. at 627 (54a). Proceeding to the final prong of the standing test the court held:

> We think it rather clear that Fulani's asserted injuries could have been redressed by the relief she sought, since, practically speaking, revocation of the League's

> tax-exempt status at least would have prevented the League's sponsorship of the debates, from which Fulani claims she was wrongfully excluded.

Id. (56a).

The District of Columbia Court of Appeals rejected the conclusions and the reasoning of the Second Circuit Court of Appeals on traceability and redressability. See Point II, infra.

The decision below not only squarely conflicts with the Second Circuit decision in League of Women Voters, it also conflicts with a decision in the Seventh Circuit Court of Appeals, and is inconsistent with prior decisions in the District of Columbia Circuit itself.

In another case arising out of petitioner's 1988 independent presidential campaign, Fulani v. Hogsett, 917 F.2d 1028 (7th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2799 (1991) the Seventh Circuit held that Fulani had standing to sue officials of the State of Indiana claiming that they had placed her two-party competitors on the Indiana ballot illegally. The defendants argued that Fulani lacked standing because she was on the ballot, and therefore was not injured by the fact that Bush and Dukakis were also on the ballot. The Seventh Circuit applied the standing requirements of Allen v. Wright, 468 U.S. 737 (1984), and rejected those arguments on the grounds that Fulani had standing as a competitive political advocate. The court stated:

> On account of the decision by the Indiana officials to allow the two major political parties on the ballot, New Alliance faced increased competition which no doubt required additional campaigning and outlay of funds. Without the Republicans and Democrats on the ballot, New Alliance would have gained additional press exposure and could have conceivably won the Indiana election, no small boon for a relatively obscure party that hoped to establish a national presence.

Id. at 1030.

The competitive political advocate theory of standing, referenced by name in Fulani v. Hogsett, supra, and In re United States Catholic Conference, supra, 885 F. 2d at 1028-31, actually emerged from decisions in the District of Columbia Circuit, most notably Common Cause v. Bolger, 512 F. Supp. 26 (D.D.C. 1980) (three-judge court). See Note: "Standing to Challenge Tax-Exempt Status: The Second Circuit's Competitive Political Advocate Theory," 58 Fordham L. Rev. 723, 729 (1990). The decision of the court of appeals below is inconsistent with those prior standing cases.

Hence, the 1992 presidential election approaches with a direct conflict between the Second Circuit and the District of Columbia Circuit on the vital issue of when a ballot-qualified candidate has standing to obtain judicial review of her claim that the Secretary of the Treasury is violating governmental neutrality by knowingly failing to enforce the non-electioneering requirements of I.R.C. § 501(c)(3) against an organization that allegedly is acting in opposition to her candidacy and in support of her opponents. Petitioners respectfully urge this Court to grant the writ and resolve the conflict between the circuits on this issue of national importance.

II: THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN CONFLICT WITH THIS COURT'S DECISIONS IN BAKER V. CARR AND ALLEN V. WRIGHT

Sup. Ct. R. 10 provides that one of the reasons that will be considered upon review of a writ of certiorari is whether "a federal court of appeals...has decided a federal question in a way in conflict with applicable decisions of this Court." The court of appeals' decision conflicts with applicable decisions of this Court in two respects. First, its analysis of redressability in the context of a challenge to a structural inequality in the election process is in direct conflict with this Court's landmark holding in Baker v. Carr, 369 U.S. 186 (1962). Second, its application of the Court's standing test in Allen v. Wright is inconsistent with fundamentals of the Court's jurisprudence of standing.

Baker v. Carr

Although the focus of both the majority decision and the dissent in the court of appeals is the application of the leading standing cases involving suits against the IRS for revocation of a tax exemption, the precise holding of the court of appeals is most problematic because of its direct conflict with this Court's landmark decision in Baker v. Carr, 369 U.S. 186 (1962).

In Baker v. Carr, the plaintiffs were voters who sought a judicial remedy for the malapportionment of election districts. They alleged that by failing since 1901 to redraw election district lines to correspond fairly to population changes, the State of Tennessee had perpetuated a structural inequality in the election process. The plaintiffs were registered to vote in districts that included far more voters than lived in other districts that received the same representation in the legislature. Hence, they were injured

> in that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties.

Id. at 207-08.

The defendants asserted that the voters had not alleged a legally cognizable injury, and their case should be dismissed for lack of standing. This Court disagreed. It held that the voters had properly alleged that they had sustained a legally cognizable injury of the type that would ensure the concrete adverseness necessary to create a case or controversy within the meaning of Article III.

If the rationale of the court of appeals below had been applied to the facts of Baker v. Carr, the voter plaintiffs would have been denied standing. First, just as it can be speculated that the Federal Election Commission could change its regulation regarding candidate debates, so too the Tennessee Legislature could, at any moment, pass new legislation undermining or rendering moot any judicial remedy that might be enacted. Second, this Court did not require the plaintiffs to allege — much less prove — that if

federal courts reapportioned the election districts then the plaintiffs would achieve any specific results in the ensuing election contests. Because the voters' injury was defined in terms of the structural inequality, the redressability of the injury would be achieved by eliminating the unequal structure.

Fulani, like the voters in Baker v. Carr, asserts that she is injured by government conduct that has tilted the electoral playing field unfairly. In order to have standing she cannot be required to demonstrate that if she is granted relief she will attain any given level and quality of media exposure (13a) any more than the plaintiffs in Baker v. Carr could be required to prove that under a fair election system they would elect the candidates of their choice or obtain better schools and public services for their counties. The court of appeals' decision leads one away from the structural inequality theory of injury not only through its analysis but also through an unfortunate misstatement of the underlying facts of the case. It asserts:

> In 1987, the League of Women Voters withdrew its traditional sponsorship of the presidential debates, leaving the field open for new sponsors. The Democratic National Committee and Republican National Committee worked together to fill this gap, and eventually incorporated the CPD for purposes of sponsoring the debates.

(2a).

In fact, there was no "gap" in debate sponsorship. To the contrary, after the announcement by the major parties that they intended to take over sponsorship of the debates, the League launched a national public relations campaign to defeat the takeover attempt. Editorial pages across the country set forth the League's argument that the presidential debates should remain under its independent sponsorship, and should not be controlled by a surrogate organization controlled by the major parties. When this suit was commenced in September 1988, the CPD, the League, and the Bush and Dukakis campaigns had agreed that the CPD

and the League each would sponsor one general election presidential candidate debate. Two weeks later the League withdrew its sponsorship in protest against the conditions imposed by the Bush and Dukakis campaigns. See supra note 3 and accompanying text.

The court of appeals' misstatement is no small mistake. Portraying the CPD as a benign organization which the major parties created as a public service to "fill this gap" in debate sponsorship, diverts attention from the government's support for the efforts of the Democratic and Republican Parties to place a two-party debates sponsoring organization into the heart of the presidential election contest. Fulani alleges that this new institution gives the major parties increased control over the public policy issues that their nominees have to address, and allows them to give their candidates a safe haven for appearing for no cost before tens of millions of voters on prime time television without any risk of having to come face-to-face with any significant independent candidate.

Malapportionment is one kind of structural inequality in an election system. Control by political parties of candidate debates that are required by law to be nonpartisan is another. The court of appeals' holding denying Fulani standing to challenge this structural inequality in the presidential election process is in conflict with Baker v. Carr.

Allen v. Wright

This Court's leading formulation of the test for Article III constitutional standing is found in Allen v. Wright, 468 U.S. 737, 751 (1984), as follows: "[A] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Along with Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), Allen is one of this Court's two leading cases that have ruled upon the standing of a plaintiff to litigate a claim that the federal government's administration of the tax laws with regard to third parties enjoying tax-exempt status under I.R.C. § 501(c)(3) violates the constitutional rights of the plaintiff.

In League of Women Voters, the Second Circuit held that under Allen and Simon, Fulani had standing. In applying these same precedents, the District of Columbia Court of Appeals reached the opposite conclusion. In order to do this, the court of appeals majority, in the words of Judge Mikva, had to engage in a "three-fold departure" from this Court's precedents. The majority, he said, "ignor[es] the Supreme Court's command to base standing analysis on the allegations actually made by a party seeking judicial redress;" "misreads seminal decisions in the standing area;" and "spins out a novel theory of redressability." (15a)

The analyses set forth by Judge Pierce in his majority opinion in League of Women Voters, and by Judge Mikva in his dissent below, cogently demonstrate that the court of appeals has misapplied the test of Allen and has decided an important question of constitutional law incorrectly. Because this Court denied standing to the plaintiffs in Allen and Simon, it is not as readily apparent as in the foregoing discussion of Baker v. Carr that the court of appeals' denial of standing to Fulani is not only erroneous, but is actually in conflict with those precedents. However, a brief review of the critical flaws in the court of appeals' interpretations of standing doctrine will show that its decision is in conflict with the fundamentals of this Court's standing jurisprudence.

The crux of the instant case, which sets Fulani's claims apart from Allen, Simon, and all previous challenges of this type, is the singularly tight nexus between Fulani's injury and the continuation of the CPD's tax exemption.[8] If the district court had granted Fulani the relief she requested, the CPD would have instantly been barred from carrying out a voter education program consisting of presidential debates that excluded Fulani and all other independent candidates and that miseducated the electorate into believing that the only legitimate candidates for president were

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[8] This Court held that the plaintiffs in Allen and in Simon had satisfied the first prong of Allen's three-part standing test — "injury in fact." In the instant case the court of appeals similarly found that Fulani had demonstrated such injury.

the nominees of the Democratic and Republican Parties. The presidential debates would no longer be controlled by an organization created by the Democratic and Republican Parties to ensure that their nominees would not have to appear in a face-to-face debate with an independent presidential candidate. Hence, the majority below had to concede:

> It is true that CPD's tax-exempt status is a cause-in-fact of [Fulani's] injury; were it not for that status, the CPD would be unable to sponsor debates under existing FEC regulations.

(9a) (emphasis supplied).

Nevertheless, the court of appeals held that the causal connections between Fulani's injury, her legal claims, and the relief she requested, were insufficient to satisfy the tests of traceability and redressability. The court of appeals stated that there were two intervening causal agents, the FEC and the CPD.

As to the first, the court of appeals said:

> [T]he FEC's regulation is an intervening cause — were it not for the regulation, the CPD's tax status would be relevant to its sponsorship of the debates only insofar as it facilitated the CPD's funding through tax-exempt funds. [9a]
>
> * * *
>
> Were the FEC to change its regulation, revocation of the CPD's tax-exempt status could have virtually no effect on the CPD's activities. [12a]

This rationale is based on a misunderstanding of the FEC regulation. The regulation is permissive, not restrictive. It grants an exemption to § 501(c)(3) organizations to engage in an activity — expending funds and in-kind resources to stage candidate debates — that neither business corporations nor nonprofit organizations otherwise could undertake. See supra note 2. The decision suggests that "were it not for the regulation" the CPD could sponsor the debates with or without holding § 501(c)(3) status. To the contrary, if the regulation were rescinded the CPD

would be unable to sponsor debates regardless of its tax-exempt status. Fulani's quest for a remedy would not be sidetracked by this set of facts but rather, it would afford her substantial relief.

Aside from the imprecision of the court of appeals' scenario about a change in the FEC regulations, it is of critical importance that speculating about a possible change in a federal agency regulation that has been undisturbed for a decade simply cannot be the basis for denying standing. "Taken to its logical end," Judge Mikva noted, "the majority's approach would preclude any suit to force compliance with a statute or administrative regulation." (22a) (emphasis in original) There certainly is no legal support for the majority's rationale in this Court's decisions in Allen, Simon, and, among other leading standing cases, Warth v. Seldin, 422 U.S. 490 (1975).[9]

The second intervening causal agent, according to the court of appeals, is the CPD. The decision below says that if Fulani won her suit, the CPD "could engage in a variety of activities" that would still deny her "the level and quality of media exposure she seeks." (13a) But,

> Fulani sued not to attain some 'level and quality of media exposure'...but to avoid the prejudice to her candidacy that would inevitably result from a one-on-one debate between rival candidates Bush and Dukakis. Thus, Fulani's injury would be redressed by any lawful response at all.

(23a)

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[9] In Allen the plaintiffs were challenging administrative enforcement practices of the Internal Revenue Service; those practices could be changed overnight by IRS officials without any formal rulemaking proceeding or even the issuance of a Revenue Ruling. But this Court never suggested that the plaintiffs' injuries were not redressable because of the possibility that the administrative practice might be changed. Similarly, the plaintiffs in Simon were challenging a newly issued Revenue Ruling — one which could be superseded and changed by another Revenue Ruling at any time. Again, this was not given as a reason to deny standing. In Warth v. Seldin, plaintiffs challenged a local zoning ordinance — this Court did not say that the possibility that the ordinance could be changed was an intervening cause defeating standing.

The fundamental point is that "it should not be necessary for Fulani to answer the majority's hypothesizing" (22a) about completely speculative and unspecified changes in a federal regulation, or about the possible responses of the CPD to such a major blow to the CPD's ability to sponsor exclusively two-party presidential debates as the revocation of its tax-exempt status. This Court denied standing in Allen because it was "entirely speculative...whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." 468 U.S. at 758 (emphasis supplied). In Simon this Court stressed that "the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire." 426 U.S. at 46 (emphasis supplied).

In the instant case, however, it is not Fulani who is speculating, but those who would deny her standing. The allegations of her complaint clearly show a "substantial likelihood" that her injury will be redressed if she wins her case. Just as the harm to voters in Baker v. Carr would be redressed by eliminating the structural unfairness of malapportioned election districts, the harm to Fulani would be redressed by the elimination of the institutionalized unfairness of presidential debates that use two-party participant selection criteria that exclude Fulani. It is the majority's speculation which demonstrates the lack of merit to its objections to Fulani's standing, and its misapplication of the precedents of this Court on a fundamental constitutional issue.

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

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September 11, 1991

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 18, 1991 Decided June 14, 1991

No. 90-5063

LENORA B. FULANI, DR., *et al.*, APPELLANTS

v.

NICHOLAS F. BRADY, SECRETARY OF THE TREASURY, FRED T. GOLDBERG, COMMISSIONER OF INTERNAL REVENUE AND COMMISSION ON PRESIDENTIAL DEBATES

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 88-02649)

Arthur R. Block for appellants.

Teresa E. McLaughlin, Attorney, Department of Justice, with whom *Shirley D. Peterson,* Assistant Attorney General, *Gary R. Allen* and *Robert S. Pomerance,* Attorneys, Department of Justice, and *Jay B. Stephens,* United States Attorney, were on the brief, for federal appellees

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Nicholas F. Brady, Secretary of the Treasury, and Fred T. Goldberg, Commissioner of Internal Revenue.

Lee Levine, with whom *Harold E. Masback, III*, and *Lewis K. Loss* were on the brief, for appellee Commission on Presidential Debates.

Before: MIKVA, *Chief Judge*, SENTELLE and HENDERSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Dissenting Opinion filed by *Chief Judge* MIKVA.

SENTELLE, *Circuit Judge*: Appellant Lenora Fulani brought this action against the Internal Revenue Service ("IRS") challenging the tax-exempt status of the Commission for Presidential Debates ("CPD"), the sponsor of the 1988 presidential debates. Fulani alleges that the CPD did not meet the qualifications for tax-exempt status under Internal Revenue Code § 501(c)(3) because it presented a partisan political viewpoint by excluding her from the presidential debates. Upon review, we agree with the District Court's conclusion that Fulani lacks standing to challenge the tax-exempt status of the CPD. For this reason, we affirm the District Court's decision to dismiss this complaint for lack of standing.

I. BACKGROUND

In 1987, the League of Women Voters withdrew its traditional sponsorship of the presidential debates, leaving the field open for new sponsors. The Democratic National Committee and Republican National Committee worked together to fill this gap, and eventually incorporated the CPD for purposes of sponsoring the debates. The CPD applied for, and received, tax-exempt status under Internal Revenue Code § 501(c)(3) as an educational organization "which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3) (1988). In addition to the benefit of being exempt from

taxation, the CPD's § 501(c)(3) status allows it to receive charitable contributions that are tax deductible to the donor. *See* I.R.C. §§ 170(a)(1), (c)(2)(D). Perhaps more importantly, this status also qualified the CPD to sponsor candidate debates under Federal Election Commission Rule 11 C.F.R. § 110.13(a)(1). Fulani attacks the CPD's tax-exempt status based on its exclusion of her from its presidential debates.

In 1988, Dr. Fulani was a minor-party candidate running as the presidential nominee of the New Alliance Party. Her name was included on the ballot in all fifty states, as well as the District of Columbia, and she qualified for Federal Election Commission presidential primary matching funds. When Fulani learned that the CPD would be sponsoring the presidential debates, she contacted the CPD, inquiring about the process for applying to participate in those debates.

The CPD responded to Fulani's request by stating that its policy was to invite "any candidate with a realistic chance of being elected to the Presidency or Vice-Presidency, whatever that candidate's party-affiliation." The CPD determined the realistic nature of a candidate's chances by examining, *inter alia*, that candidate's ballot listings; professional opinions of the media, campaign managers, and political scientists; column inches of news coverage; and findings of national pollsters. Applying these criteria, the CPD concluded that Fulani did not have a realistic chance of being elected President of the United States in 1988 and, accordingly, that she would not be invited to participate in the 1988 presidential debates.

Fulani brought this action against the IRS in the District Court, seeking to require the IRS to revoke the CPD's tax-exempt status under § 501(c)(3) and assess the taxes due once that tax-exempt status was revoked. She filed separate motions seeking temporary restraining orders or preliminary injunctions, either enjoining the debates from going forward, or requiring the CPD to include Fulani in the debates. The District Court denied

these motions, citing the "public interest in allowing the presidential debates to go forward and in preserving an orderly political process." *Order Denying Plaintiff's Motion for a Temporary Restraining Order or Preliminary Injunction* (D.D.C. Sept. 23, 1988). The District Court later dismissed Fulani's other claims, on the grounds that Fulani lacked standing to challenge the tax-exempt status of a third party such as the CPD. *Memorandum Opinion and Order* (D.D.C. Feb. 2, 1990). Appellant then filed the present appeal.

II. Discussion

Before a claimant may request this Court to decide the merits of a dispute, the claimant must establish that she has the requisite standing to bring such a claim. As the Supreme Court has defined it, a claimant establishes standing only if she alleges a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citation omitted). In the present case, Fulani contends that she is injured by the fact that the CPD is engaging in a program of political misinformation, perpetuating *bi*partisan, rather than *non*partisan, political debates. This program, she argues, advocates and perpetuates a two-party system, giving the false impression that there are only two legitimate candidates for presidential office. According to Fulani, this misinformation program directly injured her by depriving her of the media coverage and political legitimacy necessary to her campaign. Moreover, this program violates § 501(c)(3)'s mandate that tax-exempt educational organizations not engage in partisan political activities. Therefore, Fulani alleges that the IRS is responsible for her injury because it indirectly subsidized the CPD by according it § 501(c)(3) tax-exempt status. Thus, Fulani argues, the CPD's tax-exempt status is the cause of her injury,

and that injury would be redressed were that status revoked.[1]

Accordingly, Fulani seeks to require the IRS to revoke the tax-exempt status of a third party, the CPD. This claim brings to mind Justice Stewart's concurring opinion in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), stating that he could not "imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." *Id.* at 46 (Stewart, J., concurring).[2] While Justice Stewart's separate concurrence does not, of course, constitute binding precedent, we have noted previously that it "dramatically denotes the special problems attendant upon the establishment of standing in ... tax cases," when a litigant seeks to attack the tax exemption of a third party. *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 150 n.3 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); *see also Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 145 n.90 (D.C. Cir. 1977).

Indeed, the statutory scheme created by Congress is inconsistent with, if not preclusive of, third party litiga-

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[1]Fulani's arguments give rise to questions of mootness; since both the presidential debates and elections are now over, it is arguable that we can provide no legal redress to the parties in the case before us. However, as we find that Fulani's allegations also fall short of establishing standing, we need not address the mootness issue.

[2]The dissent interprets Justice Stewart's statement recognizing a possible exception in the context of the First Amendment as referring to free speech cases. Dissent at 5. This interpretation is unlikely, however, given that there exists — and did exist at the time of Justice Stewart's writing — an actual exception to the general rule against taxpayer standing in cases involving the Establishment Clause and Free Exercise Clause of the First Amendment. *See, e.g., Flast v. Cohen*, 392 U.S. 83 (1967). It is therefore logical to interpret Justice Stewart's reference to a First Amendment exception as referring to the Establishment Clause and Free Exercise Clause exceptions that actually existed, rather than to a hypothetical free speech exception.

tion of tax-exempt status. Specifically, 26 U.S.C. § 7428 (1988) provides for the "[c]reation of [a] remedy" in the case of an "actual controversy involving —

(1) A determination by the Secretary —

(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3)."

Significantly, § 7428 specifically limits the remedy it creates by the requirement that "[a] pleading may be filed under this section only by the organization the qualification or classification of which is at issue." 26 U.S.C. § 7428(b)(1).

While the cited statute does not preclude expressly the possibility that a third party could file an action under some statute or source of law other than § 7428, it certainly is telling that Congress thought it necessary to create a specific remedy for the adjudication of a § 503(c)(3) determination even on behalf of the one entity whose standing is least subject to challenge, and that Congress chose to limit the remedy to that entity. Therefore, in light of prior judicial pronouncements, such as those quoted above, and apparent congressional intent, if we were to find that a case does exist in which one party can litigate properly the tax exemption of another, it would have to be something far removed from the norm.

Fulani, however, hardly acknowledges the existence of the judicial dicta and statutory scheme against her, but seeks to ground her claim in an application of "competitor standing" theory, an application not recognized previously in this Circuit. Under Fulani's proposed application of competitor standing, we should recognize her right to challenge tax benefits that the CPD used to benefit her competitors. Unquestionably, there is such a concept as "competitor standing." That standing has been recognized in circumstances where a defendant's actions benefitted a plaintiff's competitors, and thereby caused the plaintiff's subsequent disadvantage. *See, e.g., Association of Data*

Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) (data processing agency had standing to challenge rulings by the Comptroller of the Currency allowing national banks to enter the data processing field); *see also Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987) (securities brokers had standing to challenge ruling that national banks could act as discount brokers); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) (open-end investment companies had standing to challenge ruling that banks could deal in collective investment funds).

However, this Court specifically has rejected the assertion that "*Data Processing* should be read to endorse standing for any private business, individual or corporate, which wishes to contest the tax treatment of a competitor." *American Soc'y of Travel Agents*, 566 F.2d at 151. In the *Data Processing* line of cases, the government's actions benefitted the plaintiffs' competitors and disadvantaged the plaintiffs. Thus, cessation of the government's actions would redress the plaintiffs' disadvantage by removing the benefit to plaintiffs' competitors. *Cf. also Common Cause v. Bolger*, 512 F. Supp. 26 (D.D.C. 1980) (allowing candidates for public office to challenge statutes establishing franking privileges that benefitted their incumbent competitors). Arguably, if the IRS were depriving Fulani of a benefit that it afforded to others similarly placed, she might be able to challenge that action based on her own tax liability. For example, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Supreme Court held that a magazine publisher had standing to challenge a state tax exemption available to religious magazines but not to itself, where the publisher argued that this disparate tax treatment was injurious to it and petitioned for a refund of its own taxes. Significantly, the publisher sought to litigate not the competitors' exemption, but its own liability. *See also Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932) (allowing taxpayer to make equal protection challenge to tax exemption available to competitors); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) (same). However, where a party is seeking simply to

remove a third party's entitlement to a tax exemption, the exemption likely will not bear sufficient links of traceability and redressability to the alleged injury to warrant standing under *Allen v. Wright, supra*. *See, e.g., Khalaf v. Regan*, 55 A.F.T.R.2d 85-647 (D.D.C. 1985), *aff'd*, No. 85-5274 (D.C. Cir. Sept. 19, 1986) (beneficial tax treatment of third party lacked causal link to plaintiffs' alleged harm).

The Second Circuit accepted Fulani's theory of competitor standing in the context of a parallel case, *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989). There, the Second Circuit held that Fulani had standing to challenge the § 501(c)(3) status of the League of Women Voters when the League refused to invite her to participate in the presidential primary debates. The court found that Fulani had suffered a cognizable injury because the League's exclusion of appellant "palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates." 882 F.2d at 626. According to the Second Circuit:

> In this era of modern telecommunications, who could doubt the powerful beneficial effect that mass media exposure can have today on the candidacy of a significant aspirant seeking national political office. The debates sponsored by the League were broadcast on national television, watched by millions of Americans, and widely covered by the media. It is beyond dispute that participation in these debates bestowed on the candidates who appeared in them some competitive advantage over their non-participating peers.

Id. (citation omitted). The Second Circuit characterized this injury as "the partisan restriction of her opportunities to communicate her political ideas to the voting public at large." *Id.* at 627.

The Second Circuit went on to find that this injury was "fairly traceable" to the IRS's award of a § 501(c)(3) tax exemption to the League. Under the regulations of the Federal Election Commission ("FEC"), only a non-profit corporation exempt from taxation under § 501(c)(3) may

sponsor a nonpartisan electoral debate, unless the corporation is a media organization. 11 C.F.R. § 110.13(a)(1) & (2). Thus, in *League of Women Voters*, as in this case, Fulani argued that revocation of the League's tax-exempt status would disable it from holding debates between the Republican and Democratic presidential candidates. The Second Circuit accepted this argument, concluding that Fulani's alleged injury was fairly traceable to the IRS's grant of § 501(c)(3) status to the League "[i]n light of the fact that 501(c)(3) status is in practice a prerequisite to League sponsorship of candidate debates under FEC regulations." 882 F.2d at 628. Thus, the Second Circuit granted Fulani standing to challenge the League's tax-exempt status because "[*b*]*ut for* the government's refusal to revoke the League's tax-exempt status, . . . the League, as a practical matter, would have been unable to sponsor the allegedly partisan debates which caused the injury of which Fulani complains." *Id.* (emphasis in original). Given but-for causation, the Second Circuit concluded that redressability necessarily followed, "since, practically speaking, revocation of the League's tax-exempt status at least would have prevented the League's sponsorship of the debates, from which Fulani claims she was wrongfully excluded." *Id.* at 628.

By taking the FEC regulation as a given, however, the Second Circuit ignores the fact that the alleged traceability and redressability may be found in *League of Women Voters* — and could be found in the present case — only in combination with significant intervening causal factors. It is true that CPD's tax-exempt status is a cause-in-fact of appellant's injury; were it not for that status, the CPD would be unable to sponsor the debates under existing FEC regulations. However, the FEC's regulation is an intervening cause — were it not for the regulation, the CPD's tax status would be relevant to its sponsorship of the debates only insofar as it facilitated the CPD's funding through tax-exempt funds. Thus, Fulani's claim would be addressed more appropriately under the FEC's regulation than through the Internal Revenue Code. *See* 11

C.F.R. § 111.4(a) (providing complaint process for "[a]ny person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred or is about to occur.").

Moreover, even assuming the FEC continues to adhere to its present regulations, the CPD remains an intervening causal agent. Were we to order revocation of the CPD's tax-exempt status, the CPD might decline to sponsor presidential debates altogether. This would remove the allegedly unfair advantage to Fulani's competitors, but would prevent Fulani from receiving the same benefit. Or the CPD could choose to include Fulani within the debates in order to retain its tax-exempt status, in which case the two major-party candidates might decline to participate in debates that do not present them as the two salient candidates, thus depriving the debates of the media appeal that Fulani seeks. *See Fulani v. League of Women Voters*, 882 F.2d at 632 (Cardamone, J., concurring). Thus, while the IRS's decision to provide the CPD with tax-exempt status is a cause of Fulani's claimed injury, it is merely one in a chain of independent causal factors necessary to achieve this injury. *Cf. Tax Analysts & Advocates*, 566 F.2d at 144 ("Every decision by a government agency generates consequences and various forms of impact on a wide range of valid interests held by a diverse range of parties."). Moreover, given the number of causal factors significant to Fulani's alleged injury, we find that the claim lacks sufficient redressability to warrant standing under the Supreme Court's test in *Allen v. Wright, supra*.

The Supreme Court has emphasized that "Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41-42. The Court also has made clear that an injury will not be "fairly traceable" to the defendant's challenged conduct nor "redressable" where the injury depends not only on that conduct, but on indepen-

dent intervening or additional causal factors. For example, in *Warth v. Seldin*, 422 U.S. 490 (1975), the Supreme Court held that low to moderate income minority residents lacked standing to challenge the city's zoning ordinance. The Court assumed "that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield." 422 U.S. at 504. However, the Court found that the plaintiffs had not shown that individuals in Penfield would have sold their properties to the plaintiffs absent the ordinance. The Court rejected the plaintiffs' argument that enforcement of the ordinance against third parties precluded construction of low and moderate income housing. 422 U.S. at 504. The Court noted that, although "[t]he fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing," it may "make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." 422 U.S. at 504-05.

Similarly, in *Allen v. Wright*, the Supreme Court held that parents of black public schoolchildren had no standing to challenge IRS regulations governing the tax-exempt status of private schools. According to the parents, private schools that engaged in racially discriminatory practices were able to achieve tax-exempt status under these regulations. This advantage, the parents alleged, made it possible for those schools to draw white students out of the public school system, leaving disproportionately black public schools, thus perpetuating segregation throughout the school system and preventing schoolchildren from receiving a public education in a non-discriminatory environment. The Court found that this alleged injury lacked both traceability and redressability, as it was "entirely speculative" to assume that the withdrawal of private schools' tax-exempt status would alleviate this system-wide discrimination. *Allen v. Wright*, 468 U.S. at 758. Assuming that the Court required the IRS to make the change proposed by plaintiffs, it was still impossible to say

whether the schools affected by the regulation would change their policies or their financial structures. Even more speculative was the question of whether either change by the private school would result in a decision by a parent to transfer the child to public school. *Id.* Given these intervening causal factors, the Court found that the parents lacked standing to challenge regulations directed toward third-party private schools.

The Court had reached a similar conclusion in the earlier case of *Simon v. Eastern Kentucky Welfare Rights Organization, supra.* In that case, indigent individuals and organizations representing indigents challenged an IRS Revenue Ruling that decreased the treatment-of-indigent-patient requirements for hospitals maintaining tax-exempt status under § 501(c)(3). The plaintiffs argued that this Ruling caused them injury by decreasing the standard of care available to indigent patients. The Court held that this alleged injury lacked traceability and redressability because of the intervening causal factors. The Court called it "purely speculative" to conclude that the Ruling encouraged poor treatment by the hospitals of indigents, and "equally speculative" to conclude that the hospitals' treatment of indigent patients would improve with the revocation of the Ruling. *Simon,* 426 U.S. at 42-43. Rather than improving treatment programs for indigent patients, hospitals could discontinue such programs altogether and become profit-funded, rather than charitable, institutions. *Id.* at 45-46.

In the present case, the CPD does not have the option of abandoning its tax-exempt status; the CPD may sponsor the presidential debates only if it receives tax-exempt status from the IRS and is therefore not free, as were the hospitals in *Simon,* to continue its activities as a profit-funded organization. However, the problem in this case is the same as in *Simon*: the presence of intervening factors that influence both traceability and redressability. Were the FEC to change its regulations, revocation of the CPD's tax-exempt status could have virtually no effect on the CPD's debate activities. Moreover, as discussed *supra,*

the CPD itself could engage in a variety of activities ranging from declining to sponsor the debate to restricting the debates in such a manner that Fulani still would be unable to attain the level and quality of media exposure she seeks.

In the past, this Court has denied standing where "the plaintiff seeks to change the defendant's behavior *only as a means* to alter the conduct of a third party, not before the court, who is the direct source of the plaintiff's injury." *Common Cause v. Dep't of Energy*, 702 F.2d 245, 251 (D.C. Cir. 1983) (emphasis in original) (consumer organization lacked standing to seek injunction directing government to develop energy conservation plan where court found suit was "merely designed to leverage third-party fuel suppliers into making pricing and allocation decisions favorable to the consuming public"). Here, Fulani is challenging the actions of the IRS only as a means of affecting the behavior of the CPD. The IRS's actions caused her alleged injury only due to other intervening causal factors, including the FEC's regulations, the CPD's actions, and the anticipated behavior of other debate participants. Thus, the redressability of Fulani's injury depends on those factors as well. Because these factors are not before the Court at this time, we find that Fulani's injury does not bear sufficient traceability to the IRS's grant of tax-exempt status to the CPD, nor does the requested relief redress her alleged injury sufficiently to warrant standing in this Court under the test articulated by the Supreme Court in *Allen v. Wright*.

III. Conclusion

We conclude that Fulani's alleged injury fairly cannot be traced to the IRS's grant of tax-exempt status to the CPD, but is instead dependent on the intervening actions of both the FEC and the CPD. For this reason, we hold that Fulani's claim does not warrant standing under the Supreme Court's test in *Allen v. Wright*. Because Fulani lacks standing to challenge the CPD's tax-exempt status,

the decision of the District Court in this case is therefore

Affirmed.

MIKVA, *Chief Judge*, dissenting: The law of standing deserves no prizes for clarity, nor for certainty. But ambiguity in controlling precedents does not excuse the majority's three-fold departure from them. First, the majority pays only lip service to the injury alleged by the appellants, ignoring the Supreme Court's command to base standing analysis on the allegations actually made by a party seeking judicial redress. Second, it misreads seminal decisions in the standing area, adopting a constricted reading inconsistent with judicial practice. And third, the majority spins out a novel theory of redressability that, if taken seriously, would send legitimate suitors away from federal courts in droves. I dissent.

I.

Under Federal Election Commission ("FEC") regulations, only media organizations and non-partisan, tax-exempt organizations may stage debates between candidates for federal office. *See* 11 C.F.R. § 110.13 (1991). With this in mind, the Democratic and Republican National Committees orchestrated establishment of the Commission on Presidential Debates (the "Commission"), a private, non-profit corporation dedicated to sponsoring and publicizing debates between contenders for the Presidency and Vice-Presidency of the United States.

Dr. Lenora Fulani, a candidate for President in the 1988 election, sought inclusion in debates sponsored by the Commission. Her campaign committee informed the Commission that Fulani was constitutionally eligible to serve as President, that she "fully expect[ed] to be listed on the general election ballots of all 50 states" (as in fact she was), and that she had qualified for federal primary matching funds. Letter from Gary Sinawski to Frank J. Fahrenkopf, Jr. and Paul G. Kirk, Jr. (Aug. 5, 1988). After exchanges of correspondence, the Commission denied Fulani's request, citing its policy of inviting only candidates "with a realistic chance of being elected" to the Presidency or Vice-Presidency, whatever their party affili-

ation. Letter from Janet H. Brown to Gary Sinawski (Sept. 19, 1988).

Dr. Fulani, her campaign organization, and a supporter (collectively, "Fulani") then filed suit against the Secretary of the Treasury and the Commissioner of the Internal Revenue Service ("IRS"), seeking relief including an order requiring the defendants to revoke the Commission's tax exemption under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (1988). They alleged that the federal defendants' failure to revoke the Commission's tax exemption constituted unconstitutional discrimination against Fulani based on her race and political affiliation. Fulani initially named the Commission as a co-defendant; after the district court declined to order the Commission to include Fulani in its debates, however, Fulani dropped her claims against the Commission. *See Fulani v. Brady*, 729 F. Supp. 158, 160 & n.3 (D.D.C. 1990).

In the 1988 election, Fulani received 0.24 percent of the popular vote. Later, the district court dismissed her claims against the government defendants for want of constitutional standing, finding that Fulani had not satisfactorily alleged injury, causation, or redressability. *See id.* at 160-65. The district court specifically disagreed with the reasoning of *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989), in which the Second Circuit found that Fulani had standing to challenge the tax-exempt status of the sponsor of primary election debates from which she was excluded. This appeal followed.

II.

Fulani's allegations were set out most clearly in an affidavit sworn prior to the 1988 election by Fred Newman, Fulani's campaign manager. Newman averred that Fulani's candidacy "presents the Black community (as well as other disenfranchised population sectors) an historic opportunity to exert power in national politics by becom-

ing a swing vote that can determine the outcome of the election." Moreover, he asserted that the presidential debates "confer legitimacy, credibility, [and] recognition" on candidates and their ideas. Thus:

> By excluding Dr. Fulani from debates reserved for the major party candidates, the Commission profoundly undermines her credibility with an electorate which has not been equipped to comprehend why she does not appear alongside the other two national presidential candidates on national television. Her absence from these forums casts doubt on her veracity.

Verified Statement of Fred Newman (Sept. 19, 1988). Another member of Fulani's campaign organization cast the injury in similar terms: "If [a] debate is held without Dr. Fulani, then people who viewed the debate or heard about it will be even more cautious when our canvassers knock on their doors. The exclusion will have a delegitimizing impact on her candidacy." Verified Statement of Jeffrey Aron (Sept. 19, 1988).

For standing purposes, this court must accept each of these allegations as true. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). So taken, Fulani's allegations will support a finding of Article III standing only if they demonstrate "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). When read fairly and in light of guiding precedents, they meet this test.

A. *Injury*

Although the majority does not dispute the constitutional sufficiency of Fulani's alleged injury, it fails to fully comprehend the nature of this injury, and consequently errs in later aspects of its standing analysis. For this reason, I address the injury question in some detail.

Fulani does *not* assert that she could have won the 1988 election if she had participated in the presidential debates.

Instead, she claims 1) that her credibility as a 'spoiler' and public advocate was undermined by the Commission's refusal to invite her, and 2) that allowing then-Vice President Bush and Governor Dukakis to debate alone boosted their campaigns in comparison to hers.

It follows from Fulani's allegations that whatever advantage major-party candidates have going into two-candidate presidential debates is exaggerated by the debates themselves, and that such debates disadvantage minor-party candidates. *See Johnson v. FCC*, 829 F.2d 157, 165 (D.C. Cir. 1987) (inclusion of Citizens Party presidential and vice-presidential candidates in televised debates "undoubtedly would have benefited their campaign"); *League of Women Voters*, 882 F.2d at 626 ("It is beyond dispute that participation in [primary] debates bestowed on the candidates who appeared in them some competitive advantage over their non-participating peers."). This disadvantage constitutes sufficient injury to support a finding of standing. *See League of Women Voters*, 882 F.2d at 626 ("[T]he loss of competitive advantage flowing from the League's exclusion of Fulani from the national debates constitutes sufficient 'injury' for standing purposes, because such loss palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates."); *cf. Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (cognizable harm of early candidate filing deadline is that "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign."); *Common Cause v. Bolger*, 512 F. Supp. 26, 30 (D.D.C. 1980) (three-judge court) (finding challengers for occupied congressional seats injured by franking statute because they will have to spend additional money to "neutralize" campaign advantage of franking privilege), *aff'd*, 461 U.S. 911 (1983).

The majority's failure to come to terms with Fulani's injury—so critical to its misapplication of the causation and redressability issues discussed below—is revealed by a baffling reliance on Justice Stewart's concurrence in

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 46 (1976). *See* Maj. Op. at 5. Dr. Fulani's core allegation is that she will be unlawfully burdened in seeking to make her political message known, while the Democratic and Republican candidates for President would be advantaged in advancing their rival political views. Whatever the merits of Fulani's claim, it suggests restriction of "classically political speech," and so goes to the core of the First Amendment. *Boos v. Barry*, 485 U.S. 312, 318 (1988). *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas, as well as attaining political office."). Justice Stewart took pains in his concurrence to distinguish suits that implicate First Amendment rights from other legal claims, confining his skepticism about standing to challenge the tax status of others to cases "outside the First Amendment area." *Simon*, 426 U.S. at 46.

Far from supporting the majority's hostility to Fulani's claim, Justice Stewart's concurrence joins the decisions of this and other courts in suggesting that Fulani's allegations are justiciable. Indeed, the majority's contrary claim, see Maj. Op. at 5 n.2, is misguided on two counts. When Justice Stewart suggested the particular justiciability of First Amendment claims, he surely did not have any "exception" pretaining to the religion clauses in mind; no such "exception" existed then, *see Doremus v. Board of Educ.*, 342 U.S. 429 (1952), and certainly none exists now, *see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Perhaps even more disturbing as a general matter is the majority's insistence that Justice Stewart did not mean what he plainly said. Expressive freedom is not so obscure a part of "the First Amendment area" that a Justice of the United States Supreme Court should be presumed to have overlooked it.

B. *Traceability*

The majority holds that the link between the federal defendants' refusal to revoke the Commission's tax-

exempt status and Fulani's political disadvantage is too speculative to make her injury "fairly traceable" to the defendants' failure to act. It correctly notes that FEC regulations and the Commission's role as sponsor of the debates are intervening factors tying the IRS's actions to Fulani's alleged injury. But the majority then goes critically awry by saying that "an injury will not be 'fairly traceable' to the defendant's challenged conduct . . . where the injury depends . . . on independent intervening or additional causal factors." Maj. Op. at 10. This is not, and has never been, the law.

The presence of intervening actors in a chain of events that leads from the alleged legal violation to the alleged harm will not necessarily defeat standing. *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975) ("The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing."). *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72-78 (1978); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-90 (1973); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 113-14 (D.C. Cir. 1990); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1334-35 (D.C. Cir. 1986). Rather, causation has been found lacking only where "multiple, tenuous links" connect the challenged conduct and the asserted injury. *Center for Auto Safety*, 793 F.2d at 1335.

The paradigmatic case is *Allen v. Wright*, where the Supreme Court found a chain of causation between the federal tax-exempt status of racially discriminatory private schools and integration of public schools to be "attenuated at best." 468 U.S. at 757. The claimed causation in that case involved "numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public

school students to receive a desegregated education." *Id.* at 759.

Establishing a causal nexus between the Commission's tax exemption and Fulani's injury requires no similar guesswork. The Commission's tax exemption enabled it to sponsor presidential debates, *see* 11 C.F.R. § 110.13, and the Commission had pledged to do so. If those debates went forward as head-to-head affairs, Fulani alleged, the media would focus public attention on the Bush and Dukakis candidacies, thereby setting back her campaign. Only two links in the causal chain between federal tax policy and Fulani's injury are even arguably uncertain: Fulani's claims that 1) barring judicial intervention, the media would cover Bush-Dukakis debates without publicizing Fulani's campaign in an equivalent way, and 2) voters would respond by discounting Fulani's campaign. But media coverage has focused public attention on similar debates at least since 1960, *see* Commission on National Elections, Electing the President: A Program for Reform 41-43 (April 1986), and this court has already acknowledged that television debates allow candidates who appear in them "to gain publicity and credibility with the citizenry," thereby benefitting their campaigns, *see Johnson v. FCC*, 829 F.2d at 164, 165.

Fulani's claim is similarly distinguishable from that presented in *Simon*, where the Court determined that it was "purely speculative" whether an IRS ruling concerning treatment of indigent patients had resulted in a denial of hospital services to the poor. 426 U.S. at 42. It was perfectly possible, in the Court's view, that hospitals decided whether or not to serve indigent persons "without regard to the tax implications." *Id.* at 43. By contrast, Commission sponsorship of presidential debates depends on the challenged tax exemption; as the majority concedes, the Commission could not lawfully have acted "without regard" to its tax status. Maj. Op. at 9; *see League of Women Voters*, 882 F.2d at 628 n.5 (causal nexus alleged by Fulani "far more clearly drawn" than in *Simon* "because in practice the interlocking frameworks of Inter-

nal Revenue Code provisions and FEC regulations severely narrow the League's latitude of discretion").

C. *Redressability*

The final question with regard to constitutional standing requirements is whether or not there is a "substantial likelihood" that Fulani's injury would be redressed by a favorable decision on the merits. *See Duke Power*, 438 U.S. at 75 n.20. The majority holds that there is not, arguing that the FEC might change its regulations and that the Commission "might decline to sponsor presidential debates altogether" if faced with alternatives of opening its debates to more candidates or losing its tax exemption. *See* Maj. Op. at 9-10, 12-13.

The majority's first concern cannot afford a basis for denying standing. Failing to take legally binding federal regulations as a given when evaluating redressability flies in the face of the Supreme Court's instruction that a party seeking to invoke federal jurisdiction need not negate all "speculative and hypothetical possibilities" that might frustrate the effectiveness of judicial relief. *Duke Power Co.*, 438 U.S. at 78. Just as it was not necessary for the plaintiffs in *Duke Power* to rebut claims about what might have happened had Congress not enacted legislation limiting liability for nuclear accidents, *id.* at 77-78, it should not be necessary for Fulani to answer the majority's hypothesizing that the FEC might void regulations that have stood without amendment for more than a decade.

Taken to its logical end, moreover, the majority's approach would preclude *any* suit to force compliance with a statute or administrative regulation. Because Congress or an administrative agency *might* alter any federal mandate, it is always speculative that legislative or regulatory action will not preempt a judicial declaration of law. For example, a case might be mooted by legislative enactments prior to judgment, or Congress might overturn a particular court decision by statute. However real or ethereal in a given instance, such possibilities have never pre-

cluded Article III jurisdiction in the past; they cannot do so now.

The majority's speculation about how the Commission might react to a judgment in Fulani's favor is equally misguided. Fulani sued not to attain some "level and quality of media exposure," Maj. Op. at 12, but to avoid the prejudice to her candidacy that would inevitably result from a one-on-one debate between rival candidates Bush and Dukakis. Thus, Fulani's injury would be redressed by any lawful response at all. If the Commission invited Fulani to their debate, and the media covered that event, Fulani's goals would of course be realized. But her political disadvantage would likewise be removed if the Commission included Fulani in a debate ignored by the press or if the Commission decided against holding a debate altogether. Either eventuality would eliminate the unique publicity boost that Bush and Dukakis would otherwise receive from the debate, as well as Fulani's correlative loss of political legitimacy.

D. *Prudential Considerations*

The majority does not connect its discussion of the statutory scheme surrounding section 501(c)(3) to any aspect of Article III standing. *See* Maj. Op. at 5-6. This discussion has no relevance to prudential standing considerations either, notwithstanding the majority's implicit suggestion to the contrary. Dr. Fulani and her co-plaintiffs have brought *constitutional* claims, alleging violations of their own First Amendment rights of free speech and free association, as well as of their Fifth Amendment right to equal treatment regardless of race or political affiliation. *See* Complaint at 17, 19. Under these circumstances, none of the three prudential limitations on standing identified in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982), applies. This is not a case where the plaintiffs assert constitutional rights of others. Nor is Fulani's injury merely a " 'generalized grievance,' pervasively shared." *Id.* at 475. Finally, the Supreme

Court has suggested that the "zone of interests" test, developed in the context of the Administrative Procedure Act, has no utility in the context of First and Fifth Amendment claims. *See Clarke v. Securities Industry Ass'n*, 479 U .S. 388, 400 n.16 (1987). The majority has cited no authority, and I am aware of none, suggesting that the court should gauge the justiciability of appellants' constitutional causes of action by looking to statutory enforcement schemes. *See Ukrainian-American Bar Ass'n v. Baker*, 893 F.2d 1374, 1380 n.* (D.C. Cir. 1990) ("Since the UABU asserts only the constitutional right to contact immediate action detainees, and makes no claim under any statute . . . , there is no question of prudential standing in this case.").

III.

Since I believe that the appellants have standing to bring their claims, the question of mootness becomes relevant: Is this case moot because the appellants' interest in Commission policies arises solely from Dr. Fulani's candidacy in the 1988 election? Such a defense apparently was not raised before the district court, and it was summarily rejected by the Second Circuit on the analogous facts of *League of Women Voters*. *See* 882 F.2d at 628. Although the law on this point is not altogether consistent, I believe that the case is not moot.

A case otherwise moot is justiciable when it presents issues "capable of repetition, yet evading review." *See Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Outside of the class action context, however, this exception applies only where: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that *the same complaining party* would be subject to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)) (emphasis added).

If literally applied, this rule would prevent courts from hearing election cases after ballots are cast unless the pro-

spective candidates or voters allege that they will seek to run for office or vote the next time around. Nonetheless, we have said without reservation that "[c]ontroversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters 'capable of repetition, yet evading review.'" *Branch v. FCC*, 824 F.2d 37, 41 n.2 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). Moreover, the Supreme Court and this court often have ignored the same-party requirement in the election context. *See Anderson v. Celebrezze*, 460 U.S. at 784 n.3 (ballot access); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (obstacles to independent candidacies); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) ("one man one vote" context); *Johnson v. FCC*, 829 F.2d at 159 n.7 (constitutional and statutory claims that minority candidates have right to appear in televised debates). *But see Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988) (finding same-party requirement satisfied); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774-75 (1978) (same).

Justice Scalia has noted a degree of tension between election cases and certain abortion cases, on one hand, and mootness doctrine on the other. *See Honig v. Doe*, 484 U.S. 305, 335-36 (1988) (Scalia, J., dissenting); *see also Moore v. Ogilvie*, 394 U.S. at 819 (Stewart, J., dissenting). Yet the law of this circuit, as expressed in *Branch v. FCC*, compels the conclusion that this dispute is not moot.

IV.

The problems of conducting national elections through the electronic media have become nigh impossible to solve. The "simple" difficulty of reaching voters, the more complicated difficulty of substantively informing them, and the need for huge sums to fund such communications all drive an engine of chaos in the national campaign regimen. Congress and the courts have struggled with this urgent matter, often with frustration. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976). But whatever its proper role in correcting imbalances and imperfections in the status quo,

government certainly must not abandon its posture of nonpartisanship. The government of any democracy, let alone one shaped by the values of our Constitution's First Amendment, must avoid tilting the electoral playing field, lest the democracy itself become tarnished.

The majority's decision precludes judicial inquiry into allegations that the field has been tilted in favor of the major political parties, and seems to rationalize its result by dismissing Dr. Fulani's candidacy as mere grandstanding. Yet the First Amendment requires government neutrality regardless of candidates' supposed motives. I therefore dissent from a decision that insulates from review federal complicity in keeping minor political parties off the national stage.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. LENORA B. FULANI, *et al.*, Plaintiffs, v. NICHOLAS F. BRADY, SECRETARY OF THE TREASURY, *et al.*, Defendants, COMMISSION ON PRESIDENTIAL DEBATES, Intervenor.	Civil Action No. 88-2649

MEMORANDUM OPINION AND ORDER

In this case, Dr. Lenora B. Fulani claims that the Commission on Presidential Debates' failure to invite her to participate in the 1988 presidential debates was partisan and therefore invalidates its status as a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code. This matter is now before the Court pursuant to Defendants' Motion to Dismiss on the ground that Plaintiffs lack standing.

I. FACTS

In February 1987 the Intervenor, Commission on Presidential Debates ("CPD"), was founded by the Chairmen of the Democratic and Republican National Parties in order to assume the role of sponsoring general election debates between the presidential and vice-presidential candidates which had previously been performed by the League of

Women Voters ("the League").[1] The CPD obtained tax-exempt status under section 501(c)(3) of the Internal Revenue Code,[2] making it eligible under Federal Election Commission regulations to sponsor debates between candidates for federal office. On July 7, 1987, the CPD formed an advisory committee to formulate criteria for selecting candidates for its debates. The committee recommended, inter alia, inviting only candidates who had a "realistic chance of winning" the election.

On June 24, 1987, Plaintiff Dr. Lenora Fulani ("Fulani") announced her candidacy for the office of President of the United States. She qualified for federal primary matching

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[1] The League and the CPD had initially agreed that each organization would sponsor a presidential debate; the CPD would sponsor the September 25, 1988 debate and the League would sponsor the October 13, 1988 debate. The League, however, withdrew its sponsorship of the October 13, 1988 debate because it would not agree to the format established between the major party candidates in a Memorandum of Understanding which was submitted to the League on a take-it-or-leave-it basis. The Memorandum of Understanding included provisions to control, inter alia, editorial decisions as to who will ask the debate questions and what opportunities will be available for follow-up questions. The League declared that it would not subscribe to the Memorandum of Understanding and accordingly withdrew its sponsorship of the October 13, 1988 debate, stating that "the League has no intention of becoming an accessory to the hoodwinking of the American public." The CPD stepped in immediately to take over sponsorship of the second debate and it was held as scheduled.

[2] Section 501(c)(3) provides for the exemption from federal income tax of organizations operated exclusively for charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. To qualify under this exemption an organization must not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3), as amended by Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10711, 101 Stat. 1330, 1330-464 (1987).

Furthermore, a section 501(c)(3) organization is eligible to receive charitable contributions which are tax-deductible to the donor for federal income, estate, and gift tax purposes. See 26 U.S.C. §§ 170(a)(1), (c)(2)(D), 2055(a)(2), (2106(a)(2)(A)(ii) and 2522(a)(2). See generally Association of the Bar v. Commissioner of Internal Revenue, 858 F.2d 876 (2d Cir. 1988).

funds in January 1988. In the November 1988 election she was on the ballot in all 50 states and the District of Columbia.

On July 13, 1987, Fulani wrote to the CPD, asking for a statement of its participant selection criteria. Plaintiff received no response and on August 5, 1988, Fulani wrote to the CPD to describe her candidacy, to ask for her inclusion in the CPD's debates, and to inquire as to what application procedure and criteria the CPD had created for independent presidential candidates. Twenty-five days later, the CPD informed Fulani that it would extend "an invitation to participate in one or more of its debates to any candidate with a realistic chance of being elected to the Presidency or Vice-Presidency, whatever the candidate's party affiliation." The letter did not state that there was an application procedure nor did it define the selection criteria except in two generally worded sentences.

By letter dated September 12, 1988, Fulani informed the CPD that she considered the CPD's selection criteria for non-major party candidates to be a de facto exclusion of such candidates since only the Democratic or Republican candidate had a realistic chance of winning the November election. The CPD replied in a letter dated September 13, 1988, which stated that "the Commission has adopted a set of non-partisan selection criteria" which include that the candidate have "a realistic change of being elected." On or about September 15, 1988, Fulani supplied the CPD with further information that it had requested. On September 19, 1988, the CPD denied Fulani's request for inclusion in the presidential debates.

Fulani filed this matter on September 20, 1988 against Defendants Nicholas F. Brady, Secretary of the Treasury, and Lawrence B. Gibbs, Commissioner of Internal Revenue Service, seeking injunctive relief and damages; specifically, (i) an order requiring the Defendants to revoke the tax-exempt status of the CPD under 26 U.S.C. § 501(c)(3); (ii) an order that the Defendants assess and collect taxes allegedly due from the CPD as a result of the revocation of its tax-exempt status; and (iii) an award to Plaintiffs of damages in

the amount of $5,000,000.[3] Fulani also filed separate motions for temporary restraining orders or preliminary injunctions seeking either to enjoin the CPD-sponsored debates from going forward or an order from this Court compelling CPD to include Fulani in its debates. In this Court's September 23, 1988 Order, denying Fulani's motion for relief with respect to the September 25, 1988 debate, this Court ruled that Fulani had raised "serious questions...concerning the tax-exempt status of the defendants." However, this Court denied the motion because of the "public interest in allowing the presidential debates to go forward and in preserving an orderly political process."[4] In this Court's October 12, 1988 Order, denying Fulani's motion for relief with respect to the October 13, 1988 debate, this Court reiterated the seriousness of Fulani's claims that the CPD's partisanship made it ineligible for a tax exemption, but again declined to enjoin the debate because of the public interest.

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[3] The complaint also contained three counts against CPD as a Defendant; specifically, (i) that CPD discriminated against Fulani on the basis of race and sex in violation of the Fourteenth Amendment; (ii) that Fulani has a First Amendment right to participate in the CPD-sponsored debates; and (iii) that CPD's Articles of Incorporation and status as a tax-exempt organization under § 501(c)(3) provided Fulani with a contractual right to participate in the debates. CPD filed a motion to dismiss these claims against it which was subsequently mooted by Plaintiffs' notice of dismissal of the three counts against CPD pursuant to Fed. R. Civ. P. 41(a)(1). CPD was removed from this matter as a defendant but subsequently intervened.

[4] On September 14, 1988, the Court of Appeals denied Plaintiffs' motion for summary reversal of this Court's September 23, 1988 Order, and summarily affirmed this Court's Order on its own motion. A summary affirmance is proper, especially on the court's own motion, only when the "merits...are so clear that expedited action is justified" and "no benefit will be gained from further briefing and argument of the issues presented." Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297-98 (D.C. Cir. 1987). Fulani did not appeal from this Court's October 12, 1988 Order.

II. Standing

The requirement of standing is premised on "Article III of the Constitution [which] confines the federal courts to adjudicating actual 'cases' and controversies.'" Allen v. Wright, 468 U.S. 737, 750 (1984). Standing is necessary to the jurisdiction of this Court to hear this matter. See Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (whether a plaintiff "has made out a 'case or controversy...within the meaning of Article III...is the threshold question in every federal case, determining the power of the court to entertain suit.").

The Supreme Court has developed a three-prong model by which to assess Article III standing. A Plaintiff must allege: (1) a "personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct," and (3) which is "likely to be redressed by the requested relief." Allen, 468 U.S. at 751; see also Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978); Dellums v. United States Nuclear Regulatory Comm'n, 863, F.2d 968 (D.C. Cir. 1988). The court should apply the three factors to the facts at hand with the following questions in mind: "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" Allen, 468 U.S. at 752.

The burden of establishing standing is on the Plaintiff. More fully,

> the Court must accept as true all material allegations of the complaint and construe it in favor of plaintiffs, and it may consider matters extrinsic to the complaint itself deemed supportive of plaintiffs' standing. [Citation omitted.] If however, the facts alleged do not permit a reasonable inference that defendants' putatively unlawful conduct caused the harm, or that if the relief requested is afforded the injury will be rectified, standing has not been shown, and the complaint must be dismissed.

Khalef v. Regan, 85-1 U.S. Tax Cas. (CCH) ¶ 9269 (D.D.C. 1985), aff'd, No. 85-5274 (D.C. Cir. Sept. 19, 1986).

A. Injury

The injury which Fulani claims is her exclusion from the debates.[5] However, the mere exclusion — while a specific or tangible event — cannot be deemed an injury under standing analysis in and of itself. Indeed, Fulani does not contend that her exclusion alone constitutes the injury which provides her with standing. The court must more fully assess the context of why the exclusion constitutes an injury. The reasons that Fulani proffers are not sufficient.

The first reason upon which Fulani relies to illustrate her injury is that CPD's used its tax-exempt status to advance an alleged political agenda that differs from Fulani's and to undermine her political legitimacy:

> CPD used tax-exempt funds and the privilege of its tax-exempt status to carry out a 'voter education' program in a manner calculated to show the Democratic and Republican parties in a favorable light; to discredit the very idea of independent candidates being meaningful participants in the presidential election; and to minimize the possibility that the major party candidates would be pressed to speak to public policy issues that were being raised by Dr. Fulani and other independent

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[5] Plaintiffs' Memorandum of Points and Authorities in Opposition to Commission on Presidential Debates' and Federal Defendants' Motion to Dismiss ("Plaintiffs' Memorandum") expressly states that the focus of the standing issue is on Fulani. Id. at 16 n.7. The Plaintiffs' contend that "[t]he arguments establishing [Fulani's] standing as a candidate ipso facto establish standing for her campaign organization, Lenora B. Fulani's Committee for Fair Elections." Id. As to the third Plaintiff in this action, Barbara Taylor, the Plaintiffs state that "her standing is based on her status as a supporter of the Fulani candidacy, her status as a candidate for Congress running on the same party ticket as Dr. Fulani in the 1988 General Election, as a voter, and as a taxpayer." Id. However, none of Plaintiffs' substantive analysis attempts to distinguish the standing of Taylor in any way from the other two Plaintiffs.

> candidates but which the Democratic and Republican party candidates chose to ignore or to address in generalities.

Plaintiffs' Memorandum at 13-14. However, frustrations over conduct which is at odds with an individual's own political position is precisely the type of abstract injury which other courts have ruled insufficient to constitute Article III injury. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982) ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Article III"); Khalef v. Regan, 85-1 U.S. Tax Cas. (CCH) ¶ 9269 (D.D.C. 1985), aff'd, No. 85-5274 (D.C. Cir. Sept. 19, 1986) (thwarting of pro-Palestinian plaintiffs' political aspirations by virtue of competitive advantage bestowed upon pro-Israeli groups by Secretary of Treasury by granting of tax exemption did not constitute cognizable injury). This Court rejects any notion that Fulani has suffered a cognizable injury based upon any alleged lack of recognition or diminution of her political stature. The factors by which a candidate's "political legitimacy" are measured are too diverse and intangible in order for this Court to engage in any meaningful discussion to determine whether Fulani's political legitimacy has in fact been frustrated by her exclusion from the presidential debates.

More significantly, Fulani attempts to define her injury as the loss of media exposure and voter recognition and support.[6] This argument entails two facets of injury. First, not only does she claim a loss of wide-spread media and public attention which independently would have been of value to her but, secondly, she claims that the major party candi-

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[6] Fulani describes her injury as follows:

> The complaint alleges that she had suffered harm that goes to the very essence of effective participation in a presidential election — gaining credibility, name recognition and exposure; attracting contributions of money and labor; gaining access to national broadcast coverage.

Plaintiffs' Memorandum at 17.

dates who did receive exposure from involvement in the debates obtained a competitive advantage over her in the general election.

In Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621 (2d Cir. 1989), the court held that Fulani had standing to seek revocation of the League's tax-exempt status where she alleged that the League's decision to exclude her from participating in the Republican and Democratic primary debates was partisan.[7] In League of Women Voters, the court described Fulani's injury as follows:

> In this era of modern telecommunications, who could doubt the powerful beneficial effect that mass media exposure can have today on the candidacy of a significant aspirant seeking national political office. The debates...were broadcast on national television, watched by millions of Americans, and widely covered by the media. It is beyond dispute that participation in these debates bestowed on the candidates who appeared in them some competitive advantage over their non-participating peers. [Citations omitted.] In our view, the loss of competitive advantage flowing from the...exclusion of Fulani from the national debates constitutes sufficient "injury" for standing purposes, because such loss palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates.

Id. at 626.

As a general proposition this Court does not disagree that media exposure is of considerable value to a candidate, but merely stating the obvious does not substitute for analysis of the injury requirement in Article III standing. This Court concludes that any injury that Fulani claims is speculative and, as demonstrated more fully in this Court's discussion of causation and redressability, attenuated at best.

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[7] On the merits of Fulani's claim, however, the court held that the League's exclusion of Fulani from its primary season debates did not constitute partisan activity in contravention of section 501(c)(3). Id. at 630.

First, this Court cannot reasonably infer that the debates themselves provided the participants with a competitive advantage over nonparticipants, i.e., Fulani, by the mere fact that the 1988 debates constituted media events. The Court's difficulty with the Second Circuit's analysis is that the Second Circuit assumes that the major party candidates gained something that they otherwise did not have over Fulani; namely, media exposure and public recognition. However, the very reason why the major party candidates were invited to participate in the debates was because, as conceded by Fulani, they already had a realistic chance of winning the election and already had the competitive advantage over Fulani — and other fringe party candidates — in terms of media exposure and public recognition. The only competitive advantage that the major party candidates could hope to achieve throughout the media generated by the debates would be improving their political positions relative to each other.[8]

More fundamentally, Fulani's claim that she would have received media coverage and public recognition had she been included in the debates is sheer speculation. This Court has no way of determining what the real injury to Fulani is based on her exclusion from the debates because the media coverage is dependent upon a number of diverse factors involving the structure and quality of the debates, including the number of candidates participating and the stature of those participating. If all eighty-two candidates for President in 1988 were participants in the debates this Court cannot reasonably infer that the debates would actually be broadcast nationally and that there would be millions of viewers. Indeed, even assuming that there was media coverage of a debate which involved every fringe party candidate, this Court cannot reasonably infer what practical value, if any such a political free-for-all would have

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[8] Ironically, the value of media exposure by participating in the debates is of some question by the fact that in the 1988 debates then Vice-President Bush actually negotiated for less rather than more opportunities to engage in debate appearances with his challenger Governor Dukakis.

for the American voters in terms of candidate recognition or voter education. Indeed, if such a debate were staged, this Court maintains serious doubt whether major party candidates — who presumably would be the media draw in the first place — would participate. The injury that Fulani claims she suffered — and which the Second Circuit relied upon in League of Women Voters — was based upon a debate structure involving the two major party candidates and this Court refuses to speculate that the value of these debates would remain constant if in fact Fulani — and dozens of other presidential contenders — were invited to participate. This Court cannot determine with any degree of reasonableness what the value of the media coverage would have been to Fulani had she been included in the debates. Accordingly, this Court rules that Fulani has not identified a palpable and nonspeculative injury for standing and Article III purposes.

B. Causation

The essential thrust of Fulani's injury in being excluded from the presidential debates is the loss of media exposure and political legitimacy before the American public which the major party candidates received from their involvement in the debates. However, Fulani's injury is not traceable to the tax-exempt status of CPD which allowed it to sponsor the debates under federal election law, but to the media organizations who covered the debates.

In League of Women Voters the Second Circuit analyzed the issue of causation as follows:

> Fulani's injury does not derive solely from the fact that she ultimately failed to win the presidency in 1988.[9] Rather, the asserted harm also flows from the League's

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[9] The Second Circuit recognizes that if failure to win the presidency were the only injury alleged by Fulani then she could not show causation by her exclusion from the primary debates because of the "'endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions.'" 882 F.2d at 627 (quoting Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980).

> and the federal government's allegedly partisan restriction of her opportunities to communicate her political ideas to the voting public at large. That is the essence of the judicially cognizable injury which Fulani has asserted, and, on the facts of this case, that is the injury which we find 'fairly traceable' to her exclusion from the League-sponsored debates. See also Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 186, 99 S.Ct. 983, 991, 59 L.Ed.2d 230 (1979) ("[A]n election campaign is a means of disseminating ideas as well as attaining political office....Overbroad restrictions on ballot access jeopardize this form of political expression.").

882 F.2d at 627. This Court's difficulty with the Second Circuit's analysis is that it assumes that the sponsor of the debates is the one who is providing the access by which the candidates impart their views to the public while ignoring the independent role of the media in determining whether the debates are covered.

The role of the CPD is simply as the coordinator and sponsor of the debates. The decisions to cover the debates and the extent of that coverage are made independently by the media organizations. If the CPD held a debate but no one from the media came to cover it then Fulani would be hard-pressed to assert any injury from her exclusion. Fulani cannot simply assume that media coverage of the presidential debates causally flows from CPD's — or any other organization's — sponsorship of the events. The only reasonable inference that this Court can make is that media coverage of the debates is a function of who is involved in the debates. Whether the media would choose to cover a presidential debate in which fringe party candidates are involved — with or without the presence of the major party candidates — is an editorial decision entirely within the control of the media organizations.

The Second Circuit's reliance on Common Cause v. Bolger, 512 F. Supp. 26 (D.D.C. 1980) (three-judge panel), is not persuasive to this Court. In Common Cause v. Bolger, the plaintiffs, whose members included candidates challenging

incumbent members of Congress for election, alleged that the federal franking statute, which effectively granted small subsidies to the reelection campaigns of incumbent officials, was unconstitutional because it impaired the nonincumbents' ability to compete with incumbent candidates on equal terms. Finding that the plaintiffs had standing to sue, the court stated:

> This dispute over standing boils down to a dispute over the role of...elections in our political system. If the purpose of campaigns is only to elect candidates, then defendants' and intervenor's arguments concerning causation and resultant lack of standing might have some weight. [National] campaigns, however, serve other purposes besides electing particular candidates to office. They are also used to educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidate has little hope of election. The First Amendment most certainly protects political advocacy of this type, and infringements of these rights can occur regardless of the success or failure of a particular candidate at the polls. Thus, asserted harm, and its remedy, are not dependent upon electoral outcome, but on the existence of the franking statute and the conduct permitted under its aegis.

Id. at 32.

However, in Common Cause v. Bolger the franking statute itself, by providing incumbent candidates with the free use of the United States mails, constituted direct access to the American public by which the incumbents could express their positions. In the instant case the debates themselves do not provide this direct access; rather, the causal link in the access chain is the independent decision of the media to provide the debates with free use of the radio, television and print mediums in order that the candidates can deliver their messages to the American voters.

C. Redressability

Fulani claims that "if the federal defendants were ordered to revoke the CPD's 501(c)(3) status then it immediately would be ineligible under federal election campaign finance law to carry out the specific activity which is the focus of the complaint, the sponsorship of the Presidential debates." Plaintiffs' Memorandum at 11. However, Fulani's real injury is not her mere exclusion from the debates which in turn has nothing to do with the CPD's sponsorship of the debates but with the independent editorial decisions of the media organizations. In light of the absence of any judicially cognizable injury and the lack of causation between any injury and the CPD's 501(c)(3) tax status, the inability of this Court to redress Fulani's injury is obvious.

If this Court were to order the Defendants to revoke the CPD's 501(c)(3) status and the CPD were accordingly ineligible to sponsor the presidential debates, there can be no reasonable inference that any other eligible organization would assume the role of sponsor and include Fulani in the these debates. Indeed, Fulani concedes that in the absence of CPD's sponsorship of the debates she can only speculate whether another entity would include her in the debates: "if the CPD had been eliminated from the debate sponsorship arena early in the campaign, the League or other potential debates sponsors might have taken a more receptive stance towards inclusion of Dr. Fulani either in debates or in other voter education activities." Plaintiffs' Memorandum at 13 n.5 (emphasis added). Even if another entity did sponsor the debates and include Fulani — perhaps along with all of the dozens of other fringe party candidates — this Court cannot order the media to cover the debates or the major party candidates to participate in the debates. Accordingly, Fulani might still be denied the media coverage and political legitimacy which she seeks.

Furthermore, even if there were no presidential debates and Fulani's major party opponents also lost the public exposure with which the debates provided them, the major party candidates would not lose their competitive advantage over Fulani. In Judge Cardamone's concurring opinion in

League of Women Voters, in which he agreed with the majority on the merits but argued that Fulani did not have standing, he stated:

> [The major party candidates would not be placed at a disadvantage with Fulani if the presidential debates were not held because] those candidates already have the legitimacy that she seeks, and those were the criteria employed when the League invited them to debate in the first place. The point is that the playing field remains tilted regardless of what we do because...it was not the League that tilted it.

882 F.2d at 632. If this Court ordered the Defendants to revoke CPD's status and no debates were held, this Court fails to see how the relief would "have a substantial ameliorative effect on the specific injury alleged." Id. at 628 n.6 (citing Allen, 468 U.S. at 753 n.19; Simon, 426 U.S. at 45-46).

Accordingly, it hereby is

ORDERED that the Defendants' Motion to Dismiss be, and the same hereby is, GRANTED; and it is further

ORDERED that the Plaintiffs' Complaint be, and the same hereby is DISMISSED.

2/2/90
Date

/S/
George H. Revercomb
United States District Judge

cc:

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 728—August Term, 1988

(Argued: January 31, 1989 Decided: August 2, 1989)

Docket No. 88-6243

DR. LENORA B. FULANI, LENORA B. FULANI'S COMMITTEE FOR FAIR ELECTIONS, and VIRGINIA SINCLAIR,

Plaintiffs-Appellants,

—v.—

LEAGUE OF WOMEN VOTERS EDUCATION FUND, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF THE CITY OF NEW YORK EDUCATION FUND, INC., JAMES BAKER, III, Secretary of the Treasury, and ROSCOE EGGER, JR., Commissioner of Internal Revenue,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, CARDAMONE, and PIERCE,
Circuit Judges.

ARTHUR R. BLOCK, Esq., New York, New York, *for Plaintiffs-Appellants.*

BROOKSLEY BORN, Esq., Washington, D.C. (Arnold & Porter, Washington, D.C., of counsel), *for Defendants-Appellees League of Women Voters Education Fund; League of Women Voters of the United States; and League of Women Voters of the City of New York Education Fund, Inc.*

PAUL K. MILMED, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Nancy Kilson, Assistant United States Attorney, of counsel), *for Federal Defendants-Appellees.*

Appeal from so much of a judgment of the United States District Court for the Southern District of New York, *Sweet*, J., as denied appellants' motion to compel the revocation of appellee League of Women Voters' tax-exempt status under I.R.C. § 501(c)(3).

Affirmed.

Judge Cardamone concurs in a separate opinion.

PIERCE, *Circuit Judge*:

Appellants appeal from so much of a judgment of the United States District Court for the Southern District of New York (Sweet, J.) as denied their motion to compel the government to revoke appellees' tax-exempt status under 26 U.S.C. § 501(c)(3).[1] We hold that appellant Fulani did have standing to challenge the tax-exempt status of appellees. However, since we agree with the district court that appellant failed to prevail on the merits, the judgment of the district court is affirmed.

BACKGROUND

Appellant Dr. Lenora B. Fulani was an independent and minor party candidate for President of the United States during the 1988 national elections.[2] Appellee League of Women Voters Education Fund ("the League") is a tax-exempt, not-for-profit charitable organization whose stated goals are to foster voter education and participation in the electoral process. In 1988, the League organized and sponsored three nationally-televised primary debates; two involved contenders for the Democratic Party's presidential nomination and one brought together contenders for

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1 The decision of the district court is reported at 684 F. Supp. 1185 (S.D.N.Y. 1988). The named plaintiffs in the district court action were Dr. Lenora B. Fulani, Dr. Fulani's principal campaign organization the Committee for Fair Elections, and Virginia Sinclair, a member of the League of Woman Voters who supported Dr. Fulani's candidacy.

2 Two ways in which a presidential candidate can gain access to the general election ballot in a state if he or she is not the nominee of either the Democratic or Republican Party are: (1) by collecting enough petition signatures to have his or her name placed on the ballot as an "independent," or (2) by winning the nomination of a "minor" party that has obtained a position on the ballot in that state.

the Republican Party's nomination. Each of these debates focused on these respective candidates' quest for state delegates' votes via local primary contests. Dr. Fulani attempted to procure an invitation to participate in these debates, however, the League did not invite her to take part in any of them. The League stated that its decision was based on the fact that Fulani was not seeking the nomination of either the Democratic or the Republican Party.

On March 14, 1988, before any of the debates had taken place, Fulani sued the League,[3] the Secretary of the Treasury, and the Commissioner of Internal Revenue in federal district court, seeking, *inter alia*, injunctive and declaratory relief. This appeal arises out of Dr. Fulani's unsuccessful attempt in that litigation to enjoin the League from holding any presidential primary debates without inviting her to participate therein on equal terms with the other candidates, and to compel the federal defendants to revoke the League's tax-exempt status under Internal Revenue Code ("I.R.C.") section 501(c)(3).

Section 501(c)(3) of the Internal Revenue Code provides for the exemption from federal income taxation of organizations operated exclusively for charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. *See Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876, 877 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989). Furthermore, charitable contributions to an organization which enjoys section 501(c)(3) status are tax-deductible to the donor for federal income, estate, and gift tax purposes. 26 U.S.C. §§ 170(a)(1),

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3 The League of Women Voters of the United States and the League of Women Voters of the City of New York Education Fund, Inc., were also named as defendants in this action. For purposes of this appeal, the League defendants are collectively referred to as "the League."

170(c)(2)(D), 2055(a)(2), 2106 (a)(2)(A)(ii), and 2522(a)(2). To remain eligible for the tax benefits available to such organizations, however, the organization must not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3), *as amended by* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10711, 101 Stat. 1330, 1330-464. In other words, the organization must remain strictly "nonpartisan" in its endeavors. *See* Rev. Rul. 78-248, 1978-1 C.B. 154; Rev. Rul. 86-95, 1986-2 C.B. 73; *Association of the Bar of the City of New York*, 858 F.2d at 880.

In connection with her attempt to compel the revocation of the League's tax-exempt status, appellant Fulani contended in the district court that the League had engaged in impermissible "partisan" activity when it denied her the right to participate in the Democratic and Republican primary debates. More specifically, Fulani claimed that the League had structured the debate phase of its primary election voter education program in such a way as to favor the two traditional major parties, and to exclude significant independent and minor party candidates such as herself.

After a hearing and upon considering the merits of plaintiffs' contentions, Judge Sweet denied the plaintiffs' motion for injunctive and declaratory relief, and dismissed all except one of the remaining ancillary claims, which was later voluntarily withdrawn by the plaintiffs. On appeal, Fulani reiterates her contention that the League engaged in "partisan" activity when it refused to allow her to participate in the 1988 Democratic and Republican primary debates, and urges that, conse-

quently, the League's tax-exempt status under I.R.C. § 501(c)(3) should be revoked. Appellees assert that Fulani's contentions are baseless, and that, in any event, appellants lack standing to challenge the government's tax treatment of the League. For the reasons stated herein, we affirm the district court's decision rejecting appellants' attempt to compel the revocation of the League's tax-exempt status.

DISCUSSION

A. *Standing*

As a threshold matter, we must determine whether Fulani has standing to maintain this action. Although the district court explicitly chose not to reach this issue, it is fundamental that "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.' " *Allen v. Wright*, 468 U.S. 737, 750 (1984). If Fulani fails to satisfy the basic threshold standing requirements, then as a general principle, we are without jurisdiction to entertain this appeal. *See Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (whether a plaintiff "has made out a 'case or controversy . . . within the meaning of Article III . . . is the threshold question in every federal case, determining the power of the court to entertain the suit.").

The Supreme Court instructs us that there are three "core component[s]" to apply in assessing Article III standing. A plaintiff must allege: (1) a "personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct," and (3) which is "likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. Moreover, the injury must be " 'distinct and palpable,' " *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91,

100 (1974) (quoting *Warth*, 422 U.S. at 501), and not " 'abstract' " or " 'conjectural' " or " 'hypothetical.' " *Allen*, 468 U.S. at 751 (citations omitted). Applying these concepts in determining whether there is standing in a given case often can be a difficult task. Typically, the examining court should conduct its standing inquiry with the following questions in mind: "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? [And] [i]s the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" *Allen*, 468 U.S. at 752. These are the principal questions which guide our inquiry in this case.

The League and the federal defendants have presented three basic arguments in support of their claim that Fulani lacks standing to maintain this action. First, the appellees contend that Fulani has not suffered a judicially cognizable injury. Second, the appellees assert that Fulani's alleged injury is too speculative and remote to be "fairly traceable" to either her exclusion from the League's debates or the tax-exempt status of the League. And, finally, the appellees claim that even if Fulani did suffer a " 'distinct and palpable' " injury, that injury is incapable of being redressed by the relief she seeks since the 1988 presidential elections are now past history. Although we ultimately agree with appellees that Fulani's section 501(c)(3) claims were appropriately dismissed on the merits, we disagree with appellees' contention that, as a threshold matter, Fulani lacked standing to compel the revocation of the League's tax-exempt status.

In arguing lack of standing, appellees point out that federal courts have frequently rejected attempts by litigants to

challenge the tax-exempt status of third parties. *See, e.g., Allen*, 468 U.S. 737; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *see also American Soc'y of Travel Agents v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); *Khalaf v. Regan*, 85-1 U.S. Tax Cases (CCH) ¶ 9269 (D.D.C. 1985), *aff'd*, No. 85-5274 (D.C. Cir. Sept. 19, 1986). Appellees rely on these cases to support their contention that Fulani lacks standing to compel the federal defendants to revoke the League's tax-exempt status. However, we find this case to be distinguishable from the cited cases because Fulani's asserted injury is both "judicially cognizable" and "fairly traceable" to the conduct of appellees.[4]

Reading Fulani's complaint in the most favorable light, as we are bound to do at this stage of the proceedings, *Warth*, 422 U.S. at 501, the prohibited conduct challenged by Fulani is the continued grant of a tax exemption by the IRS to an organization which allegedly engaged in "partisan" activities, in contravention of I.R.C. § 501(c)(3). According to Fulani, by allowing the League to continue to enjoy its section 501(c)(3) status, the IRS unlawfully encouraged and permitted the League of Women Voters to promote indirectly certain political parties and candidates over others during the critical primary phase preceding the general election. Specifically, Fulani contends that "the federal defendants have distorted the political process by permitting the tax subsidy and privileged status of 501(c)(3) exemption to be used to favor the campaigns of Democratic and Republican party candidates in the presidential election, and to disadvantage the campaign of [herself] and her supporters." Fulani claims that as a

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4 Since we hold that Dr. Fulani did have standing, and must therefore address the merits herein, we need not—and do not—pass on whether the other appellants also had standing.

significant political aspirant for the presidency, she was directly injured by the League's refusal to include her in the subject nationally-televised primary debates because she lost critical media exposure and any competitive advantage which might have flowed from her participation in those debates, and because she was deprived of the opportunity to communicate her political ideas to the electorate on equal terms with other significant presidential candidates.

It is important to note at this point that Fulani does not claim the League was obligated to include in these debates every individual who had announced his or her candidacy for the presidency. As the League pointed out in the district court, at the time this litigation was commenced, approximately 280 individuals had filed statements with the Federal Election Commission ("FEC") indicating that they considered themselves to be candidates for the office of President. Fulani contends that the League was obligated to use *non-partisan* criteria in deciding whom to include and exclude from the debates. For instance, under the League's existing eligibility rules for the debates, once a candidate had demonstrated that he was either a member of the Democratic or Republican Party, the League then used the "significance" of an individual's candidacy as a means of limiting the number of Democrats and Republicans who could appear in the debates. The League did not, however, examine the "significance" of a candidate *until* that person satisfied the League's threshold party affiliation requirement. For purposes of determining Fulani's standing to challenge whether the League's use of such a requirement was inconsistent with its section 501(c)(3) status, we accept Fulani's contention that she was a "significant" candidate in this election, and that she therefore would have been included in the League's debates if she

had been a member of either the Democratic or Republican Parties.

We believe Fulani has alleged an injury in fact which satisfies the first prong of the standing analysis. In this era of modern telecommunications, who could doubt the powerful beneficial effect that mass media exposure can have today on the candidacy of a significant aspirant seeking national political office. The debates sponsored by the League were broadcast on national television, watched by millions of Americans, and widely covered by the media. It is beyond dispute that participation in these debates bestowed on the candidates who appeared in them some competitive advantage over their non-participating peers. *See* 1 R. Bauer & D. Kafka, *United States Federal Election Law* ch. 2, at 29 (1984) (major party competitors in candidate debates receive "substantial media exposure without charge," which "surely constitute[s] a benefit of considerable value" to them, at the expense of nonmajor party candidates); *cf. Johnson v. F.C.C.*, 829 F.2d 157, 165 (D.C. Cir. 1987) ("[petitioners'] inclusion in the televised debates undoubtedly would have benefited their campaign"). In our view, the loss of competitive advantage flowing from the League's exclusion of Fulani from the national debates constitutes sufficient "injury" for standing purposes, because such loss palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates. To hold otherwise would tend to diminish the import of depriving a serious candidate for public office of the opportunity to compete equally for votes in an election, and would imply that such a candidate could never challenge the conduct of the offending agency or party. *See Anderson v. Celebreeze*, 460 U.S. 780, 792 (1983) (Ohio statute impermissibly burdened the campaign efforts of independent candidates by

making "[v]olunteers . . . more difficult to recruit and retain, [and] media publicity and campaign contributions . . . more difficult to secure"); *Common Cause v. Bolger*, 512 F. Supp. 26, 30-31 (D.D.C. 1980) (three-judge court) (candidates and campaign participants had standing to challenge franking statute which allegedly conferred unlawful benefit on incumbents seeking reelection, on grounds that granting subsidy to incumbents taints the political process and renders it unfair). *See generally* 1 R. Bauer & D. Kafka, *supra*, ch. 2, at 28-30 (discussing generally problems which arise when nonmajor candidates are excluded from candidate debates).

We must, then, turn to the second and overlapping area of inquiry, the question whether the subject injury is "fairly traceable" to the conduct of the appellees. Both the League and the federal defendants first assert that Fulani's alleged injury—*i.e.*, the loss of her ability to compete on an equal footing with the other candidates—is too "remote" and "speculative" to be fairly traceable to their conduct, because her eventual loss of the 1988 presidential election cannot fairly be attributed to her exclusion from the League's primary debates. In so arguing, the defendants rely on the D.C. Circuit's decision in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), wherein the court held that supporters of Senator Edward Kennedy's effort to win the 1980 presidential nomination of the Democratic Party lacked standing to challenge President Carter's alleged use of federal funds and public authority to promote his own renomination.

In *Winipisinger*, the court rejected the plaintiffs' claims on the ground that Senator Kennedy's inability to obtain the Democratic Party nomination could not fairly be attributed to the alleged misconduct of members of Presi-

dent Carter's administration and reelection committee, given the "endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions." 628 F.2d at 139. We find *Winpisinger* inapposite, however, because Fulani's alleged injury is much less attenuated than the injuries asserted therein.

In terms of judicial assessment of injury for standing purposes, we find the analysis in *Common Cause v. Bolger* to be persuasive. In *Bolger*, candidates alleged that the federal franking statute, which effectively granted small subsidies to the reelection campaigns of incumbent officials, was unconstitutional because it impaired the new contenders' ability to compete with incumbent candidates on equal terms. Finding that the plaintiffs had standing to sue, the court stated:

> This dispute over standing boils down to a dispute over the role of . . . elections in our political system. If the purpose of campaigns is only to elect candidates, then defendants' and intervenor's arguments concerning causation and resultant lack of standing might have some weight. [National] campaigns, however, serve other purposes besides electing particular candidates to office. They are also used to educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidate has little hope of election. The First Amendment most certainly protects political advocacy of this type, and infringements of these rights can occur regardless of the success or failure of a particular candidate at the polls.

512 F. Supp. at 32 (emphasis added). Fulani's injury does not derive solely from the fact that she ultimately failed to

win the presidency in 1988. Rather, the asserted harm also flows from the League's and the federal government's allegedly partisan restriction of her opportunities to communicate her political ideas to the voting public at large. That is the essence of the judicially cognizable injury which Fulani has asserted, and, on the facts of this case, that is the injury which we find "fairly traceable" to her exclusion from the League-sponsored debates. *See also Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas as well as attaining political office. . . . Overbroad restrictions on ballot access jeopardize this form of political expression.").

The federal defendants next assert that even if Fulani can attribute her injuries to her exclusion from the debates, that injury cannot be fairly traced back to the IRS's tax treatment of the League. In several of the recent federal court cases cited by appellees, *supra*, which address challenges to the tax-exempt status of an organization, it was indeed the lack of any nexus, or causal connection, between the tax-exempt status of the organization whose conduct was being challenged and the alleged injuries of the plaintiffs which led the courts to find lack of standing. *See, e.g., Allen v. Wright*, 468 U.S. at 757; *Simon*, 426 U.S. at 40-43; *American Soc'y of Travel Agents*, 566 F.2d at 149-50. Herein, appellants concede that ordinarily it is difficult to trace a judicially cognizable injury to the government's tax treatment of a particular organization, because so often it borders on "pure speculation" to assert that withdrawal of the tax exemption would cause independent third parties to change their allegedly discriminatory conduct. *See Allen*, 468 U.S. at 757-59; *Simon*, 426 U.S. at 42-46. Appellants point out, however, that the facts of this case render any such "spec-

ulation'' unnecessary, because there is an evident nexus between the government's tax treatment of the League and the claimed injury.

As the government itself concedes, the League of Women Voters Education Fund in effect would have been prohibited under relevant Federal Election Commission regulations from sponsoring *any* candidate debates if the League's 501(c)(3) tax-exempt status had been withdrawn at the time appellant Fulani sought to compel revocation of that status. *See* 11 C.F.R. §§ 110.13, 114.4(e) (1988) (narrow regulatory exception for nonpartisan debates sponsored by § 501(c)(3) ''staging organizations''); *see also* 1 R. Bauer & D. Kafka, *supra*, ch. 2, at 28-30. *But for* the government's refusal to revoke the League's tax-exempt status, then, the League, as a practical matter, would have been unable to sponsor the allegedly partisan debates which caused the injury of which Fulani complains. In light of the fact that 501(c)(3) status is in practice a prerequisite to League sponsorship of candidate debates under FEC regulations, we conclude that there is a nexus between the federal defendants' tax treatment of the League and Fulani's asserted injuries which enables Fulani to trace her injury directly back to such federal defendants' tax treatment of the League.[5]

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5 The concurring opinion argues that Fulani's alleged injury could be termed ''fairly traceable'' to the government's actions *only* if ''the government's conferral of the tax exemption *caused* the League to hold the debates from which Fulani was excluded.'' (Emphasis in original.) This proposition seems to go beyond *Simon v. Eastern Kentucky Welfare Rights Organization*, upon which it rests, and beyond traditional standing analysis. The point that the Court was making in *Simon* was not that the tax exemption had to directly cause the alleged injury, but rather that many other factors—aside from the tax exemption—may well have contributed to plaintiffs' alleged injury. Thus, held the Court, the injury was not fairly traceable to the tax exemption. 426 U.S. at 41-46. Here, in contrast, the causal chain is far more clearly

Next, we must examine the "redressability" prong of the standing analysis, namely, whether there is a "causal connection between the alleged injury and the judicial relief requested." *Allen*, 468 U.S. at 753 n.19. We think it rather clear that Fulani's asserted injuries could have been redressed by the relief she sought, since, practically speaking, revocation of the League's tax-exempt status at least would have prevented the League's sponsorship of the debates, from which Fulani claims she was wrongfully excluded. This being so, Fulani has met the third part of the standing test.[6]

Finally, in a slight variation of their failed "redressability" argument, appellees also argue, albeit indirectly, that Fulani's claims are "moot" because the presidential election is now over. We find these arguments wholly without merit, since "[t]he issues properly presented, and their effects on minor-party candidacies, will persist in future elections, and within a time frame too short to allow resolution through litigation. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.' " *Johnson v. F.C.C.*, 829 F.2d 157, 159 n.7 (D.C. Cir. 1987) (quoting *Storer v. Brown*, 415 U.S. 724,

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drawn because in practice the interlocking frameworks of Internal Revenue Code provisions and FEC regulations severely narrow the League's latitude of discretion.

6 In the concurrence, it is urged that Fulani fails the redressability prong of the standing analysis. The concurrence argues that the requested relief would not redress Fulani's weakness as a candidate, and that the "playing field [will] remain[ ] tilted regardless of what we do." This, however, seems to raise the requirement of redressability too high. For the redressability prong to be met, the courts need not be able to level the "playing field" between the actors involved; instead, there need only be a substantial likelihood that the relief requested will have a substantial ameliorative effect on the specific injury alleged. *See generally Allen*, 468 U.S. at 753 n.19; *Simon*, 426 U.S. at 45-46.

737 n.8 (1974) (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911))); *see also Honig v. Doe*, 108 S. Ct. 592, 601-04 (1988). Accordingly, we find that appellant Fulani's claims are not moot, and that she has satisfied all three of the applicable standing requirements.

B. *The League's Allegedly Partisan Conduct*

Although we find that Fulani has alleged sufficient injury to satisfy the standing requirements, her claim on the merits fails. The League's exclusion of Fulani from the primary debates it sponsored during the early part of 1988, on the facts presented herein, did not constitute partisan activity in contravention of its tax-exempt status under I.R.C. § 501(c)(3).

At the outset, we agree with Fulani that the prohibition against partisan activity in section 501(c)(3) bars more than the partisan promotion of certain candidates over other candidates, and we agree that an organization's selective promotion of certain *parties* over others would be inconsistent with its section 501(c)(3) tax-exempt status. *See Association of the Bar of the City of New York*, 858 F.2d at 879, 880 (" '[t]he prohibition on political campaign activities [in I.R.C. § 501(c)(3)] . . . reflect[s] Congressional policies that the U.S. Treasury should be neutral in political affairs' ") (quoting from H.R. Rep. No. 391, 100th Cong., 1st Sess. 1621, 1625 (1987), *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1, 2313-1201, 2313-1205)). Herein, however, appellant Fulani's contention that the League engaged in partisan activity when it limited participation in the primary debates it sponsored to members of either the Democratic or Republican Party is without merit. In assessing whether the League's inclusion of only Democratic and Republican

candidates in its primary debates was "partisan," we must first consider the context in which that limitation was made, and then examine that action in light of the claims advanced by appellants.

It is of critical importance that the subject debates were not *general election* debates. Rather, they were *primary season* debates, sponsored by the League in an effort to educate the electorate about the candidates who were vying for the nomination of either the Republican or the Democratic Party. While primary contests are, in a broad sense, an integral part of the whole presidential election process, they also serve an important function in our current electoral system separate and distinct from that served by the general presidential election contest which occurs quadrennially in November.

Most often, presidential primary elections are state-wide political party contests among candidates who seek to garner the commitment or support of delegates who select that party's nominee for President during the national party's political convention. Primary contests, then, are essentially *intra-party* competitions. Although such candidates are members of the same party, each may have a separate political agenda for the party's future, and they present themselves to those who are eligible to vote in the primary as the candidate who will best represent the party in the general election. *See Nader v. Schaffer*, 417 F. Supp. 837, 844 (D. Conn.) (three-judge court), *aff'd mem.*, 429 U.S. 989 (1976).

The League of Women Voters Education Fund historically has sponsored primary debates during presidential election years in an effort to educate voters about relevant issues and about candidates seeking to become party nominees. As discussed, in 1988 the League sponsored three

separate debates for the significant candidates who were seeking either the Democratic Party or the Republican Party nomination. In each of these intra-party debates, the League provided candidates with a forum to debate each other so that those eligible to vote might decide which candidate could best represent the Democratic or Republican *Party* in the upcoming general election. By bringing together in one forum the significant candidates for the Democratic Party's presidential nomination and, in another forum, the significant candidates for the Republican Party's presidential nomination, the League's Board endeavored to help voters and supporters make an informed choice when time came to vote in the Republican and Democratic primary contests. It is against this backdrop that we must assess Fulani's claims. Appellants do not argue that the League failed to provide contending independent and minor-party candidates with an opportunity to debate issues and present candidates germane to their own respective nominating processes equal to that afforded the major parties, and therefore we need not address this issue. Instead, Fulani contends that, as a "significant" independent and minor-party presidential candidate, she was entitled to, and should have been provided with, an opportunity to engage the candidates for the *Republican* and *Democratic* Party nominations in a multiparty dialogue about issues of national concern.

In so arguing, Fulani has miscast the purpose of the primary phase of national elections. As discussed, primary elections are an "internal mechanism" by which parties resolve intra-party differences prior to party nominating conventions, if any, and prior to the general election, and they are the mechanism by which parties select "standard bearers" to represent them in the upcoming general election. *See Storer v. Brown*, 415 U.S. 724, 735 (1974) ("con-

tending forces within the party employ the primary campaign and primary election to finally settle their differences''). Fulani's attack on the League's primary voter education program essentially blurs the distinctions between the primary phase and the general election phase of the contest for the presidency, insofar as Fulani sought to compel the League to convert its ''primary season'' voter education program into a ''general election'' program for educating voters about *inter-party* differences. At least for purposes of deciding this appeal, we believe the distinctions between the primary and general election phases of the presidential contest are legitimate and proper ones to draw.

Given the goals underlying the primary phase of the presidential election contest—*i.e.*, to resolve intra-party disputes and select among competing candidates—it becomes clear that the League's limiting of the debates to Republican and Democratic Party candidates was not ''partisan,'' and thus was not in contravention of I.R.C. § 501(c)(3). Rather, it was a logical consequence of the nature and role of primary contests in the electoral process. There has been no contention in this appeal that the League improperly excluded significant minor parties in designing its primary voter education program, only that the League improperly excluded Fulani as a single significant candidate from the subject debate forum. Fulani, however, was neither a candidate nor a participant in either of the primary contests that were the subject of the League's challenged voter education program. Since Fulani was not competing in either of those primary contests, it was not improper for the League to exclude her from the three debates in issue.

CONCLUSION

We have considered all of the other arguments raised on appeal and find them to be without merit. The League's exclusion of appellant from its primary season debates did not constitute "partisan" activity in contravention of I.R.C. § 501(c)(3). The decision of the district court is therefore affirmed.

CARDAMONE, *Circuit Judge*, Concurring:

Because appellant has not satisfied the Article III requirements for standing the district court lacked subject matter jurisdiction over this suit. Thus, I am unable to concur in the majority's otherwise cogent discussion of the merits.

In my view, the majority has misapprehended the import of *Allen v. Wright*, 468 U.S. 737 (1984) and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) (*Eastern Kentucky*). It is undisputed that a plaintiff must satisfy each of the three requirements of injury in fact, traceability and redressability before the strictures of the Article III standing requirements are met. *See Allen v. Wright*, 468 U.S. at 751; *Eastern Kentucky*, 426 U.S. at 41. Even assuming *arguendo* that Fulani has stated a judicially cognizable injury, she has nonetheless failed to establish standing's causal prongs of traceability and redressability.

Traceability assesses the "causal connection between the assertedly unlawful conduct and the alleged injury . . . ." *Allen v. Wright*, 468 U.S. at 753 n.19. In its discussion of the traceability requirement, the majority asserts that "*[b]ut for* the government's refusal to revoke the League's tax-exempt status, then, the League, as a

practical matter, would have been unable to sponsor the debates which caused the injury of which Fulani complains." *Supra* at 15 (emphasis in original). Invocation of more than the phrase "but for" is needed to link plaintiff's injury to the defendants' conduct. Although § 501(c)(3) status is arguably a Federal Election Commission prerequisite to candidate debate sponsorship, that does not, in and of itself, connect the defendants' putative violation of § 501(c)(3) to Fulani's diminished ability to compete in the political arena. All Fulani's complaint establishes is that the government's assertedly illegal conduct *allowed* the League to act in a way that may have injured her; she does not allege that the IRS has provided an incentive for the League to engage in partisan acts. To satisfy the traceability requirement, plaintiff must allege that the government's conferral of the tax exemption *caused* the League to hold the debates from which Fulani was excluded, which was the source of her asserted injury. *Cf. Eastern Kentucky*, 426 U.S. at 42-43 (stating that it did not follow from assertion that an IRS ruling " '*encouraged*' hospitals to deny services to indigents" that "the denial of access to hospital services in fact *result[ed] from*" defendant's conduct.) (emphasis added).

Further, appellant cannot attribute her injury to the defendants' conduct because the recipient of the purportedly illegal governmental benefit—the League—is not in competition with Fulani; only the major party candidates compete with her in the political arena. Because whatever injury Fulani has suffered is traceable to the Democratic and Republican candidates, who are not defendants in this action, appellant has failed to meet the traceability requirement and has therefore no standing to bring suit. *Cf. Eastern Kentucky*, 426 U.S. at 41 ("[I]njury at the hands of a hospital is insufficient by itself to establish a

case of controversy in the context of this suit, for no hospital is a defendant.").

Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir.) (per curiam), *cert. denied*, 446 U.S. 929 (1980) is instructive. The court there held that supporters of Senator Edward Kennedy's presidential nomination bid lacked standing to complain that members of President Jimmy Carter's cabinet and reelection committee had promoted his reelection by allegedly illegally using federal funds and by abusing the power of incumbency. Fulani's traceability argument is even more attenuated than that proffered by the *Winpisinger* appellants—litigants whose direct competitors were the same parties who had allegedly broken the law. Nonetheless, the court held that "[t]he endless number of diverse factors potentially contributing to the outcome of . . . elections . . . forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event." *Id.* Because standing was properly denied in *Winpisinger*, it follows, *a priori*, that it should also be denied here.

Moreover, appellant has not satisfied the final requirement of standing inquiry, that of redressability. This prong focuses on the causal connection between the injury plaintiff alleges and the judicial relief sought. *Allen v. Wright*, 468 U.S. at 753 n.19. Fulani's asserted injury is her competitive disadvantage as a candidate vis-à-vis major-party candidates who—unlike her—were invited to participate in the League's televised debates. The principal relief she seeks is injunctive: Restraining the League from conducting a debate to which she is not invited, or ordering the IRS to revoke the League's tax exempt status. Neither of these remedies will cure the alleged injury. Consequently, it would violate core values underlying

Article III standing requirements and separation of powers doctrine to allow her to invoke the power of the judiciary to right a wrong that does not flow from defendants' actions. This is particularly true where, as here, we are asked to tell the executive branch whom it should prosecute for tax violations; in essence, advise it how it should implement the laws. *See Allen v. Wright*, 468 U.S. at 759-60; *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

The relief sought appears to redress Fulani's injury only if one ignores the Article III "aspect of standing [that] reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982). It seems to me that Fulani has underestimated the autonomy that the League would retain regardless of our holding in this case, and that she has overestimated the coercive powers that would flow from her requested relief. Additionally, as is the case whenever a plaintiff complains about the IRS' tax treatment of another person or entity, appellant's prospects for redress from a judicial order are diminished by the independent actions of parties not before us. Therefore, even were appellant were to obtain the remedy she seeks, the League could exercise options other than inviting her to its debates, and her injury would therefore remain unredressed.

For example, rather than abide by the terms of our injunction, the League might decide to discontinue its hosting of Presidential debates and stop such sponsorship altogether. *Cf. Eastern Kentucky*, 426 U.S. at 43 (stating that rather than treating more indigents and thereby redressing plaintiffs' injury, "it is just as plausible that the hospitals to which respondents may apply for service

would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services."). If the League ceases sponsoring debates, Fulani would still be denied the media exposure she seeks. Of course, the major party candidates—Fulani's competitors—would also lose the free television time the debates provide and would thereby seem to be placed at a similar disadvantage with her. But those candidates already have the legitimacy that she seeks, and those were the criteria employed when the League invited them to debate in the first place. The point is that the playing field remains tilted regardless of what we do because, as indicated in the traceability discussion, it was not the League that tilted it.

The speculative nature of the majority's inquiry is of concern because even were Fulani's preferred scenario to come true and the League were to sponsor a debate to which she would be invited, the Democratic and Republican Parties—who as non-parties to this litigation are beyond the scope of the court's remedial powers—could decline the League's invitation. *Cf. Allen v. Wright*, 468 U.S. at 759 (stating that how the parents of children in the private schools whose tax status was at issue would respond to a change in the school's tax status was speculative). In fact, during the last general presidential election, the Democratic and Republican Parties did supplant the League by forming the "Commission on Presidential Debates," that is, a bipartisan organization which undertook the sponsorship and staging functions heretofore carried out by the League. Thus, the credibility that Fulani seeks from debating with better-known candidates falls beyond the scope of relief that we have the power to grant.

Finally, there are those third-parties for whose votes appellant competes: Television viewers and voters. With due respect to appellant, it strikes me as sheer conjecture to attribute their apparent rejection of her candidacy to any actions taken by the defendants.[1] *See Winpisinger*, 628 F.2d at 139; *see also Allen v. Wright*, 468 U.S. at 759 (holding that the causal connection was too weak to support standing because it "involves numerous third parties . . . whose independent decisions may not collectively have a significant effect" on achieving plaintiff's goal of desegregated education).

The foregoing hypotheticals are concededly speculative, but the majority also engages in conjecture when it posits what results might flow from its holding, "practically speaking." Such conjecture, the Supreme Court teaches, is fatal to plaintiff's standing to maintain this action. *See Allen v. Wright*, 468 U.S. at 758-59; *Linda R.S. v. Richard D.*, 410 U.S. at 681. The minimum requirements of Article III are not satisfied by the "remote possibility" that Fulani's opportunity for election would have been better had defendants acted differently, and might improve if a court rules in her favor. *See Warth v. Seldin*, 422 U.S. 490, 507 (1975).

Accordingly, though I concur with the disposition of this appeal, it is on the separate grounds that Fulani's complaint should be dismissed for lack of subject matter jurisdiction for lack of standing.

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1 Fulani might respond by asserting that winning is not the issue, and that she merely wants the IRS and the League to stop breaking the law and thereby to cease distorting the political process. But if Fulani so conflates her injury to rectify the attenuated nature of her causation arguments, then my assumption for purposes of discussion of causation that Fulani had stated a judicially cognizable injury would be untenable. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974).